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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1988

EARTH SATELLITE CORPORATION
and
CONTINENTAL CASUALTY COMPANY,
Petitioners,

v.

ROBERT HASTINGS,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES DEPARTMENT OF LABOR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Earth Satellite Corporation and Continental Casualty Company, pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 19, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals entered March 19, 1980, not yet reported, appears in the Appendix hereto (App. 1-27a), as do the opinion and decision of the Benefits

Review Board dated June 30, 1978 (App. 28a-37a), and the decision and order of Administrative Law Judge Robert S. Amery dated August 12, 1977 (App. 38a-61a).

JURISDICTION

The Court of Appeals for the District of Columbia Circuit had jurisdiction under 33 U.S.C. §921. The judgment of the Court of Appeals was entered on March 19, 1980, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was the 1972 Congressional repeal of the $24,000.00 limit in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §914(m), statutorily applicable to or constitutionally permissible for workers permanently partially injured prior thereto?

2. Was the Administrative Law Judge's determination of the injured worker's average weekly wages at the time of his second accident supported by substantial evidence, considering the record as a whole?

STATUTES INVOLVED

District of Columbia Code:

§36-501. *Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.*

The provisions of chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to

the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

United States Code, Title 33:

§906. *Time for Commencement of Compensation.*

(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That if the employee's average weekly wages, as computed under section 910 of this title, are less than $18 per week he shall receive as compensation for total disability his average weekly wages.

[Pre-amendment]

§906. *Time for Commencement of Compensation.*

(b) (1) Except as provided in subsection (c) of this section, compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum of $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 percentum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive the average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

[Post-amendment]

§908. *Compensation for Disability.*

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total

disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee as follows:

* * * * * * * * * * * * *

(21) Other cases: In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage earning capacity thereafter, in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

§910. *Determination of Pay.*

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis

upon which to compute compensation and shall be determined as follows:

* * * * * * * * * * *

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

§914. *Payment of Compensation.*

* * * * * * * * * * *

(m) The total money allowance payable to an employee as compensation for an injury under this chapter shall in no event exceed in the aggregate the sum of $24,000: *Provided,* That this limitation shall not apply to cases of permanent total disability or death: *And provided further,* That in applying this limitation there shall not be taken into account any amount payable under section 908(b) of this title for maintenance during rehabilitation or title for maintenance during

rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under section 918 of this title.

On October 27, 1972, the Act was amended and provided:

§5(e), 86 Stat. 1254. Section 14 of such Act is amended by striking out subsection (m).

§22, 86 Stat. 1263, provided:

Amendments made by this Act shall become effective 30 days after the enactment of this Act.

§921. *Review of Compensation Orders.*

* * * * * * * * * * * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and

processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by the award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer and carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

United States Constitution:

Art. I, Sec. 10. — No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or impairing the obligation of contracts, or grant any title of nobility.

Amend. 5. *Criminal actions — Provisions concerning — Due Process of law and just compensation clauses* — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. 14. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 1, 1971, Robert Hasting was an officer of and employed as a quality control man for Earth Satellite Corporation at an annual salary of $30,000.00. On that date he had a stroke. On February 8, 1972, Mr. Hastings returned to work for Earth Satellite on a part time basis where he continued to work on a pro-rated salary basis, part time, until he had a phlebitis attack producing pulmonary emboli in March 7, 1974. As a result of this second occurrence, the claimant ceased working on March 14, 1971, and he has not worked since.

A claim was filed by Mr. Hastings under the District of Columbia Workmen's Compensation Act for both incidents. At the time of the stroke in 1971, the District of Columbia Workmen's Compensation Act allowed a maximum weekly benefit of $70.00, pursuant to 33 U.S.Code §906(b), and it further provided that no weekly disability benefits were due beyond $24,000.00 except for permanent

total and death in accordance with 33 U.S.Code §914(m). On November 26, 1972, the $24,000.00 limitation was repealed by Congress.

A formal hearing was held on the consolidated claims, and on August 17, 1977, Administrative Law Judge (ALJ) Robert S. Amery entered a compensation order in the claimant's favor awarding temporary total and then permanent partial disability benefits from the date of the first accident to March 13, 1974, the last date the claimant worked, at the maximum pre-1972 amendment rate of $70.00 per week. Thereafter, for the second accident, the ALJ awarded Mr. Hastings permanent and total disability benefits from March 14, 1971, onward at the rate of $118.32 per week. This was based on an average weekly wage of $177.00 at the time of the second accident which in turn was calculated by utilizing Mr. Hastings' earnings of $9,200.00 during the 52 weeks prior to the second accident pursuant to §10(c) of the Act. The first 104 weeks were directed to be paid by Continental Casualty Company, Earth Satellite's workmen's compensation carrier, with future benefits thereafter payable from the Special Fund pursuant to 33 U.S.Code §908(f) and 33 U.S.Code §944 of the Act.

An appeal was taken by Mr. Hastings to the Benefits Review Board (BRB) urging only that the ALJ erred in basing the award of permanent total disability from the second injury on his part time earnings from the time he returned to work on February 8, 1972, through March 13, 1974, rather than on his annualized earnings of $30,000.00 prior to his first accident.

The Director, Office of Workers' Compensation Programs (OWCP), also appealed, alleging that the ALJ had erred in applying §8(f) of the Act, thereby making the Special Fund liable for benefits subsequent to March 14,

1974. The Director further contended tht the ALJ erred in terminating the claimant's benefits for the permanent partial disability flowing from the first accident as of the date of the permanent total award due to the second accident, rather than entering concurrent awards for the effects of each accident.

On June 30, 1978, the BRB rejected the appeal of the claimant, and it held that the calculation of the claimant's average weekly wages and computation of benefits for Mr. Hastings' second injury was correct. It also affirmed the accountability of the Special Fund for the award of permanent total disability, but it reversed the ALJ on the cessation of permanent partial disability from the first accident. The Board held that the claimant was entitled to receive a pre-1972 weekly maximum of $70.00 for permanent partial disability flowing from the 1971 accident until the applicable statutory maximum of $24,000.00, pursuant to §14(m) of the unamended Act, had been paid.

A petition for review was then filed by the claimant only with the United States Court of Appeals for the District of Columbia Circuit challenging his benefit entitlement from the second injury as well as the Board limitation of $24,000.00 for his permanent partial disability benefits stemming from the first accident pursuant to §14(m) of the unamended Act. On March 19, 1980, the Court of Appeals for the District of Columbia Circuit affirmed the "framework" of the BRB's decision, but it held that the BRB had erred in setting the dollar amount of the award for the second accident and in applying the $24,000.00 ceiling to the permanent partial disability from the first injury.

As to the first point, the Court concluded that the repeal of §14(m) was to be applied retroactively and thus applicable to any pre-amendment injury where the per-

manently partially disabled worker had not yet reached the $24,000.00 maximum. It held that since Congress had not specifically said that the repeal was not to be retroactive, then the Court was obliged to apply it retrospectively. Arguments by the employer and carrier alleging no legislative support for a retroactive application, plus constitutional violations of impairment of contract provisions and vested rights principles were either ignored or rebuffed.

Secondly, the Court of Appeals held that the BRB incorrectly determined the worker's average weekly wages at the time of the second accident, and that rather than utilizing the 52 week period suggested by 33 U.S.Code §910(c) of the Act, the ALJ and BRB should have taken the two or four week period immediatley prior to the second accident since they concluded that that would be more reflective of the worker's earning capacity.

REASONS FOR GRANTING WRIT

I

TO RESOLVE CONFLICT BETWEEN RETROACTIVITY DETERMINATION MADE BY THE DISTRICT OF COLUMBIA FEDERAL COURT OF APPEALS AND PRIOR ESTABLISHED PRECEDENT FROM UNITED STATES SUPREME COURT

A. Retroactivity In General And As Applied To Repeal Of 33 U.S.C. §914(m)

The United States Court of Appeals for the District of Columbia Circuit held in the present case, applying its interpretation of a *1974* decision by this Court, *Bradley v. School Board,* 416 U.S. 696, that unless the *1972* amendments to the Longshoremen's and Harbor Workers' Compensation Act contained affirmative statutory direction or

legislative history to the contrary, or unless manifest injustice would result, the repeal of 33 U.S.C. §914(m) of the Act was to be applied retroactively to pre-amendment claims. (App. 16a) It stated:

> "We find no Congressional intention that the repeal *not* be applied retroactively. The statutory language, to be sure, does not specifically *require* retroactive application of the repeal. We think, though, that the absence of a provision *prohibiting* retroactivity is significant. . . ."

It is respectfully urged that this analysis is in conflict with and a clear departure from long standing Supreme Court precedent, plus it involves a misrepresentation and misapplication of *Bradley, supra.*

As a general rule of statutory construction, no provision of a statute is to be construed so as to give it retroactive effect unless such intent clearly appears from the Act itself. 16A *Am. Jur.* 2d, Constitutional Law, §662. In *Miller v. United States,* 294 U.S. 435 (1934), this Court held that statutes are not to be given a retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears.

In *Greene v. United States,* 376 U.S. 149 (1962), the leading case dealing with retroactivity enunicated by this Court at the time the 1972 amendments to the Longshoremen's Act were passed by Congress, a government contractor's private employee had his security clearance withdrawn by the government, as a result of which he lost his position with the government contractor. At the time the security clearance had been revoked, there was in effect a 1955 Department of Defense directive which provided for monetary remuneration for loss of earnings

resulting directly from a suspension of clearance where a final determination was made favorable to such employee.

When such a final determination had been made in his case, the employee asserted a claim under the 1955 directive for recoupment of his lost earnings. While the matter was still pending within the agency, a superseding directive was issued in 1960 which substantially altered the prior directive. The government contended that since the later directive was in force prior to a determination of the claim, it should be applicable and be applied retroactively.

This Court, in rejecting that contention, observed at p. 160:

> "The first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature. . . ." Also see *Claridge Apartment Co. v. Commissioner of Internal Revenue,* 323 U.S. 141 (1944), and *Thorpe v. Housing Authority of the City of Durham,* 393 U.S. 268 (1969)

The District of Columbia Circuit, however, totally ignored this precedent and applied the reverse test. In other words, in 1972, when Congress repealed §14(m) of the Act, the state of the law from this Court was such that unless there was a clear indication to the contrary, a statute was to be applied prospectively only; yet based on its interpretation of a decision handed down by this Court some two years later, the District of Columbia Circuit concluded that unless Congress expressly prohibited a statute from being retroactive, then it would operate retrospectively.

The Benefits Review Board, the Labor Department's intermediate reviewing body under the Act per 33 U.S.C. §921, in a consistent line of cases dating back to January 30, 1975, beginning with *Hayes v. Independent Stevedoring Co.*, 1 BRBS 264 (1975), applied the traditional long standing retroactivity directives from this Court and concluded that the repeal of §14(m) of the Act did not affect individuals entitled to permanent partial disability who had been injured prior to the 1972 amendments. The Board stated:

> "The Board does not find any indication of such an intention by Congress. Had Congress intended to extend benefits retroactively, it would have stated so explicitly as it did in §10 of the Act, 33 U.S.C. §910, and provided for such payments as indicated in §44 of the Act, 33 U.S.C. §944. To extend benefits to claimants receiving permanent partial disability benefits awarded for injuries occurring prior to the effective date of the amendments would amount to an increased liability on the employer-carrier since payments from the 'Special Fund' are limited by §44(j) of the Act to use for permanent total disability and death benefits for injuries occurring prior to the effective date of the amendments to the Act. It is only reasonable to conclude that had Congress intended a retroactive application by the repeal of §14(m) it would have at least provided for a method of payments as it did for §10 adjustments, if not expressly stating such a retrospective intent. The Board believes that to hold otherwise would be illogical and would not fit within the pattern of the 1972 amendments.
>
> "The Board's holdings in cases arising under amended §28 of the Act, 33 U.S.C. §928, are not

inconsistent with our present position. See, e.g., *Suderman Stevedores, Inc. v. Sanders,* BRB No. 122-73 (December 28, 1973). In those cases, were the hearings all occurred after the effective date of the amendments, the Board found that the application of the amended section in question did not operate with any retroactive effect. In this case the rights and liabilities of the parties were fixed at the time of the injury.

"The Director suggests a similarity with the applications of the 1934 amendment to §22 of the Act, 33 U.S.C. §922. See, e.g., *Bethlehem Shipbuilding Corp. v. Cardillo,* 102 F.2d 299 (1st Cir. 1939). Under that section, which amended procedures, any further imposition of a financial burden would be the result of further adjudication on the merits. However, under amended §22 the ultimate liability incurred by the employer was fixed upon the date of injury and the amendment did not retroactively increase that ultimate liability. Similarly, we hold here that the ultimate liability of the employer under §14(m) was fixed upon the date of injury and cannot be increased by a repeal of this section. To hold otherwise would be to permit an unlawful retroactive application of the Act. The Board cannot permit a substantive right to be procedurally altered short of express statutory authority.

"In the absence of specific statutory language clearly providing for the retroactive application of the repeal of §14(m), the Board affirms the order of the Administrative Law Judge rejecting a new and additional financial obligation on the employer-carrier by the continuation of perma-

> nent partial disability benefits for an injury occurring prior to the effective date of the amendments."

This holding and approach has been applied by the Board ever since then in *Mendenhall v. Northwest Marine Iron Works,* 1 BRBS 485 (1975); *Salusky v. Army Air Force Exchange Service,* 3 BRBS 22 (1975); *Swann v. George Hyman Construction Co.,* 3 BRBS 490 (1976); *Vinson v. Avondale Shipyards,* 8 BRBS 597 (1978); *Correia v. General Dynamics Corp.,* 8 BRBS 602 (1978); *Davis v. George Hyman Construction Co.,* 9 BRBS 127 (1978).

When one reviews the entire legislative history surrounding the 1972 amendments, including the abundant testimony and proposals made at the Congressional hearings, plus the committee reports and floor discussion, one can find nothing whatsoever to support the idea that when Congress repealed §14(m) of the Act, it intended that change to apply to pre-amendment injuries. Hearings Before the Select Subcommittee on Labor of the Committee on Education and Labor, 92nd Cong., 2nd Sess., on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 (1972); Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Cong., 2nd Sess., on S. 2318, S. 525, and S., 1547 (1972); 118 Congressional Record, pp. 30397, 30670-74, 36265-74, 36390-96.

In view of the significant impact which would occur on pending pre-amendment injuries, as will be elaborated on in a later section, it is clear that if Congress had intended such a far reaching result, there would have been some addressing of the issue as evincing Congressional desires.

One can contrast this situation with the issue of whether or not the 1972 amendments put a cap on weekly death benefits as it did for weekly injury benefits which was considered by this Court in *Director, OWCP v. Rasmussen, et al.*, 440 U.S. 29 (1979). There the Benefits Review Board, applying the same traditional test utilized in determining the effect of the repeal of §14(m) of the Act, determined that the elimination of the maximum benefit provision from 33 U.S.C. §909(e) was done consciously and intentionally and that the failure to substitute a new weekly maximum for death claims was a deliberate action. The Director, OWCP, had argued that the failure to include same was due to Congressional oversight.

This Court examined the legislative history extensively and rejected the Director's position. This Court concluded that it was inconceivable that Congress, with the debate of maximum benefits raging all about it, could have unwittingly omitted the death benefits ceiling in amended §909(b). 404 U.S. at 38, footnote 11. The Court further concluded, with support from the House and Senate Committee reports, that the failure to put a ceiling on death benefits was intentional. Here, insofar as the repeal of §14(m) is concerned, nothing of that sort appears.

With respect to the District of Columbia Circuit's reliance on *Bradley v. Board of Education,* 416 U.S. 696 (1974), it is respectfully urged that its interpretation and analysis is incorrect.

As explained in *Marshall v. B & O R.R., 461 F.Supp. 362, 382 (D.Md. 1978), Bradley* established a three prong test to determine whether a retrospective application would be manifestly unjust. The factors to be considered were:

1. The nature of the parties.

2. The nature of their rights.

3. The nature of the impact of the changes in the law upon those rights.

The *Bradley* opinion emphasized throughout its analysis that in "mere private suits", where the parties are individuals, a court should "struggle hard against a construction which will, by retrospectiv operation, affect the rights of parties." *Id.* at 712. The opinion, in attempting to define "private", contrasted such suits with actions involving issues of great national concern. In *Bradley* the issue was school desegregation; the party against whom the statute was being applied was a public entity; and the funds in jeopardy were public funds held in trust by the Board. *Bradley* is thus one of the least private suits that could be constructed.

In contrast, the *Marshall* court held that although the issue involved was of national concern (age discrimination), the parties themselves were private individuals who had a right to rely on current, reasonable interpretations of existing law in arranging their activities and relationships. *Marshall* at 382. The court stated that "[t]his private interest is a cornerstone of a just and orderly society that should be given no less weight then (sic) the need to eradicate age discrimination in employment." *Id.* at 382. The court said that the mixture of public and private interests distinguishes the case from *Bradley*. The Hastings case, with its mixture of interests, is clearly closer to *Marshall,* where the private interests prevailed, than it is to *Bradley*.

The second and third prongs of the *Bradley* decision, as analyzed by the *Marshall* court, dealt with the nature of the rights affected and the nature of the effect on those rights. As stated above, the School Board's rights were only rights in public funds held in trust. The Board had no

funds of its own, and the members of the Board were not personally affected. The court did say that applying a law that would infringe upon or deprive a person of a right that had matured or become unconditional should be avoided. *Bradley* at 720. *Marshall* noted that the second and third factors should be read concurrently so that the questions became:

> 1. Whether the party could expect that it had a right to engage in the now proscribed activity, *or*
> 2. Whether the party would have ordered its conduct differently if it had known the new statute was going to apply.

Marshall at 383.

The court in *Marshall* emphasized that in the cases it had seen in which laws had been applied retroactively the rights affected were those of public defendants, not private citizens. In concluding, the court stated that:

> "To apply the amendment, under these circumstances, would work a manifest injustice on the right of these defendants, as private entities, to go forward with a course of action which they validly believed was in conformance with the best interpretation of the law at that time." *Id.* at 383.

There is little doubt that petitioners would have "ordered their conduct differently" if they could have foreseen the abolition of§14(m). It is equally certain that they are private entities whose private rights are being threatened.

Indeed, the Court of Appeals here virtually conceded as much in footnote 22 of its opinion when it stated:

> "The distinction between retroactive changes in *principles* of liability and changes in*remedies* for such liability does not mean that retroactive changes in remedy cannot also be unfair. They obviously can be so, particularly in the context of insurance. Actuarial calculations are based on the expected *magnitude* of liability in addition to its expected *frequency*. Thus, insurers are harmed when their past premiums prove to be inadequate fully to reflect the increased liability mandated by a retroactive change in remedy. Such is the case with the repeal of section 14(m). Insurers doubtless set their premiums based on the expectation that recoveries would be limited to $24,000." (App. 19a)

Despite the obvious concession of unfairness to this particular insurance carrier and all other insurers who will obviously be affected by the Court of Appeals ruling, if upheld, the District of Columbia Circuit sought to further justify its holding by claiming that the repeal of §14(m) was directed at the *remedy* under the Act rather than involving a *substantive right*. (App. 18a) It is respectfully urged that the expansion of liability here can hardly be deemed to be other than the affecting of a substantive right.

It has generally been held that legislation which limits or increases statutory liability is substantive in nature. *Herrick v. Sayler*, 245 F.2d 171 (7th Cir. 1957); *Field v. Witt Tire Co.*, 200 F.2d 74 (2nd Cir. 1952); Cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). Although these decisions involve subsequent legislative enactments increasing statutory liability for wrongful death cases, the obvious parallel to increased exposure here and its being a substantive right is clearly apparent.

It has also generally been held that a remedial amend-

ment to a statute is one which neither enlarges nor impairs substantive rights, but rather deals strictly with procedures for enforcing those rights. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *Bagsarian v. Parker Metal Co.*, 282 F.Supp.766 (D.Ohio, 1968). Remedial has consistently been equated with procedural. *Coreil v. Pearson,* 242 F.Supp. 802 (D.La. 1965); *Jackson v. National Linen Service,* 248 F.Supp. 962 (D.Va. 1965). Cf. *Denver & Rio Grande Western Railroad Co. v. Brotherhood of R.R. Trainmen,* 387 U.S. 556 (1967). Thus, the District of Columbia Circuit's view that the removal of a $24,000.00 ceiling to one of unlimited liability is only a remedial change is wholly at odds with substantial prior precedent.

In connection with amendments to workmen's compensation statutes, it is noted in 81 *Am.Jur.* 2d, Workmen's Compensation, §34, as follows:

> "In harmony with the established principle that legislative enactments, in the absence of a clearly expressed intent to the contrary, will be deemed to be prospective, and not retrospective, workmen's compensation acts have been held not to apply to injuries which occurred before the law went into effect. On the same principle, it is held that an amendment of the statute in respect of a matter of substantive right does not apply to existing injuries or to claims arising by reason of the prior death of an injured employee. Neither can a curative statute be made applicable to claims for compensation occurring prior to the enactment thereof."

The prospective application of other amendments to the Act since their amendment in 1972 fixing the parties' rights as of the date of the injury can be found in *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974);

Rios v. Empresas Lineas Maritimas Argentinas v. Fred Imbert, Inc., 575 F.2d 986 (1st Cir. 1978); *Drachenberg v. Canal Barge Co. Inc.*, 571 F.2d 912 (5th Cir. 1978); *Uglem v. Foss Launch & Tug Co.*, 541 F.2d 1378 (9th Cir. 1976); *Murphy v. Woods Hole, Martha's Vineyard & Nantucket SS Auth*, 545 F.2d 235 (1st Cir. 1976); *Yochim v. Likes Bros. SS Co. Inc.*, 444 F.Supp. 6 (D. 1977); and *Scalafini v. Moore, McCormick Lines Inc.*, 388 F.Supp. 897 (D. 1975). In *Bell v. Isthmian Lines, Inc.*, 363 F.Supp. 156, 159 (D.Fla. 1973), the Court oberved:

> "Further evidence of Congressional intent that the section is to be applied prospectively is the fact that the amendments also improved the benefit structure of the Act. The maximum benefit amounts were increased, along with other changes in calculation of benefits and survivor benefits."

The Court of Appeals further sought to buttress its ultimate conclusion on the retroactivity score by observing that in each prior case where Congress had amended the Act's benefit structures, it had expressly made those increases inapplicable to injuries or deaths occurring before the date of the enactment. Since Congress did not expressly do so here, the Court implies by that silence Congress deviated from its past practice of specifically providing for non-retroactivity. (App. 17a)

The short answer to that contention is that with all prior monetary-type amendments, the benefits which pre-amendment claimants were receiving was left untouched, whereas here pre-amendment permanent total disability or death benefits recipients receive monetary increases via a sophisticated phase-in paid for from Congressional appropriations. See, for example, 33 U.S.C. §910, §944. Thus, if there had been a general statement by Congress

that the 1972 amendments were not to apply to pre-amendment injuries or deaths, there would be a total conflict between such language and those individuals who were to get the enhanced benefits for pre-amendment permament total disability and death claims. Indeed, the fact that there is no similar phase-in for permanent partial disability recipients strongly suggests that they were to be left intact, particularly where the $70.00 per week pre-amendment maximum ceiling under §6(b) of the Act was not changed.

In summary then, it is respectfully urged that there is no legislative support that the repeal of §14(m) was to operate on pre-amendment injuries. The Court of Appeals approach with respect to retroactive application of that statutory amendment is clearly erroneous and in conflict with the traditional rules of construction espoused by this Court. In addition, retroactive application of the repealed portion of the statute will have a substantial impact on numerous claims pending under the Act.

B. Impairment Of Contracts And Vested Rights

This Court has long held that where the result of a statutory repeal will be to impair contracts or vested rights, a construction is to be *avoided* which will give it retrospective operation. *Moultrie County v. Rockingham Ten-Cent Savings Bank,* 92 U.S. 631 (1876); *McClurg v. Kingsland,* 1 Howard (U.S.) 202 (1843). Numerous state and Federal courts applying the traditional tests outlined by this Court have consistently followed this Court's lead in holding that increases of substantial monetary benefits created after the date of an injury are in violation of Article I, Section 10, of the United States Constitution if applied retroactively.

The most recent decision speaking to this issue is found in *Cooper v. Wicomico County, Department of Public Works,* 278 Md. 596, 366 A.2d 55 (1976). There, a worker was injured in 1969, and the Maryland Commission awarded permanent and total disability benefits at an appropriate weekly rate not to exceed $30,000.00 in total, the maximum payable at that time under the Maryland Act. In 1973 the Maryland legislature increased the ceiling to $38,397.00 for pre-amendment permanent total injuries, and it also increased the weekly maximum rate.

This retroactive legislation was challenged, and the Court of Appeals concluded that despite the clear legislative intent to make these benefits retroactive, it was unconstitutional because it adversely affected the impairment of contract and vested rights provisions of the Constitution. The Court's analysis addressing these issues and relying in part on Supreme Court precedent was as follows:

> "We think the lower court was correct if the operational effect of ch. 832 requires an employer or insurer to pay more than it was required to pay under the law in effect at the time of the injury. It is generally held that the basis of a compensation award is contractual and that the amount payable thereunder by an employer or insurer cannot be increased retrospectively.
>
> "In *State Industrial Commission v. Nordenholt Corp.,* 259 U.S. 263, 271, 42 S.Ct. 473, 474, 66 L.Ed. 933 (1922), the Supreme Court said:
>
> > " '. . . An award under the workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute

> giving the commission power to make an award is read into and becomes a part of the contract . . . The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. . . . It is a part of the compensation agreed to be paid for services rendered in the course of the employment.'

"To the same effect is *Bradford Electric Light Co. v. Clapper,* 286 U.S. 145, 159, 52 S.Ct. 571, 575, 76 L.Ed. 1026 (1932), where the Court observed that '[f]or the purpose of that act, as of the workmen's compensation laws of most other states, is to provide . . . not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.' *See also Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1944), holding that a workmen's compensation award which has become final is entitled to the same full faith and credit as a judgment of a court, so that another state may not increase that judgment for the same injury. *Compare Ireland v. Shipley,* 165 Md. 90, 102, 166 a. 593, 598 (1933), wherein our predecessors noted that '[t]he rational basis of the policy underlying the [workmen's compensation] act is that there be some definite time limit in respect to the award of compensation, in order that employers may organize their businesses and insurers adjust their rates with an intelligent

comprehension of the demands they may be called upon to meet.

"A number of courts throughout the country have held that to give effect to a legislative enactment increasing the amount payable to an employer to a sum greater than that payable at the time of the injury would impermissibly alter the substantial term of an existing contract between an employer and an employee (and derivatively as to an insurer). *See,* for example, *Loveless v. State Workmen's Compensation Commissioner,* 155 W.Va. 264, 184 S.E.2d 127 (1971); *Mitchell v. U.S.F. & G.Co.,* 206 F.Supp. 489 (E.D.Tenn. 1962); *Noffsker v. K. Barnett & Sons,* 72 N.M. 471, 384 P.2d 1022 (1963);*b Lyon v. Wilson,* 201 Kan. 768, 443 P.2d 314, 319 (1968). *See also Preveslin v. Derby & A. Developing Co.,* 112 Conn. 129, 151 A. 518 (1930)."

Any legislation which purports to change a substantial term of a contract operative at the time of a claimant's injury serves to impair the obligation of such contract in contravention of the Constitution. 81 *Am.Jur.*2d, Workmen's Compensation, § 18; 16A *Am. Jr. 2d,* Constitutional Law, §682. An impairment may be shown if new burdens are imposed which materially increase or decrease the value and benefits of the contract. 16 *Am.Jur.*2d, Constitutional Law, §697.

This rationale was followed in *Phillips v. City of West Palm Beach,* 70 S.2d 345 (Fla. 1954), where the applicable benefits for a scheduled loss (foot) were held to be those in existence at the time of injury and not those in effect when the disability occurred. See also *Liberato v. Royer,* 720 U.S. 535 (1926); *Hyatte v. Armstrong Cork Co.,* 121 So.2d 793 (Fla. 1960); *Hecht v. Parkinson* 70 So.2d 505

(Fla. 1954); *Walker and LaBerge, Inc. v. Halligan,* 344 So.2d 239 (Fla. 1977).

In *Preveslin v. Derby & Ansonia Developing Co.,* 112 Conn. 129, 151 A. 518 (1930), the court held that an attempt to retroactively apply increased benefits violated not only the impairment of contract provisions of Article I, §10, of the United States Constitution, but also the vested rights protection of the Fourteenth Amendment.

Similar holdings may be found on one or both bases in *Warner v. Zaiser,* 184 Minn. 598, 239 N.W. 761 (1931); *Yaeger v. Delano Granite Works,* 250 Minn. 303, 84 N.W.2d 363 (1957); *Salmon v. Denhart Elevators,* 72 S.D. 110, 30 N.W.2d 644 (1948); *Gauthier v. Penobscot Chemical Fiber Co.,* 120 Me. 73, 113 A. 28 (1921); *In re Beausoleil's Case,* 321 Mass. 344, 73 N.E.2d 461 (1947); *McClung v. National Carbon Co.,* 190 Tenn. 202, 228 S.W.2d 488 (1950); *State ex rel. Conley v. Pennybacker,* 131 W.Va. 442, 48 S.E.2d 9 (1948); *Washabaugh v. Bartlett Collins Glass Co.,* 177 Okla. 159, 57 P.2d 1162 (1936); *Swatek Construction Co. v. Williams,* 177 Okla. 305, 58 P.2d 585 (1935); *Thomas v. Crummies Creek Coal Co.,* 297 Ky. 210, 179 S.W.2d 882 (1944); *General Refractories Co. v. Henderson,* 313 Ky. 613, 232 S.W.2d 846 (1950). An extended discussion and analysis coming to the same conclusion is found in *Tennessee Coal & Iron Div., U.S. Steel Corp. v. Hubbert,* 110 So.2d 260 (Ala. 1959), which relied in part on *P.J. Carlin Construction Co. v. Heaney,* 299 U.S. 41 (1936). Also see 73 *Am.Jur.*2d, Statutes, §378.

In *Mitchell v. U.S. F. & G. Co.,* 206 F.Supp. 489 (D.Tenn. 1962), the Court stated:

> "The right of an injured employee to compensation benefits arises from his contractual relation-

> ship with his employer existing at the *time* of his injury, and the statute *then* in force forms a part of the contract and determines the substantive rights and obligations of the parties [citation omitted]. To the extent that Workmen's Compensation statutes do form a part of the contractual relationship between an employee and his employer, the Constitution of the United States prohibits the enacting states from impairing the obligation of such contracts – Cf. *Phillips v. City of West Palm Beach* (Fla.S.Ct.), 70 So.2d 345 (1935); *Salmon v. Denhart Elevators,* 72 S.D. 110, 30 N.W. 2d 644 (1948)."

Although the foregoing decisions involve Article I, §10, of the United States Constitution and the Fourteenth Amendment, which address actions by the states, the Fifth Amendment due process guarantee similarly applies to Federal legislation. 16A *Am.Jr.*2d, Constitutional Law, §700; *John McShain, Inc. v. District of Columbia,* 92 U.S.App.D.C. 358, 205 F.2d 882 (1953); *Johnson v. United States,* 111 Ct.Cl. 750, 79 F.Supp. 208, 211 (1948); *Miller v. Howe Sound Mining Co.,* 77 F.Supp. 540 (D.C.Wash. 1948); *Trozze v. Drooney,* 232 N.Y.S. 2d 139, 35 Misc. 2d 1060 (1962); *Fleming v. Nestor,* 363 U.S. 603, 611 (1960).

That clause protects vested rights and prohibits them from being destroyed, divested or impaired by direct Congressional legislation. *Deutsche Bank Und Discoto-Gesselschaft v. Cummings,* 65 App.D.C. 296, 83 F.2d 554 (1936). As Justice Field stated in *Pacific Mail S.S. Co. v. Joliffe,* 2 Wall. 450, 457, 17 L.Ed. 905 (1864).

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that

> nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

In *Ettor v. City of Tacoma,* 228 U.S. 148 (1913), the State of Washington enacted a statute which allowed abutting property owners to recover compensation for consequential damages arising out of a street grading made under municipal direction. After the plaintiff had sustained the type of damage contemplated by the statue, the law was repealed. The Supreme Court held that the repealing legislation deprived the plaintiff of a vested property right which could not be defeated by subsequent legislation. The right to workmen's compensation benefits under the Longshoremen's Act has been held to be a property right. *Maryland Casualty Co. v. Lawson,* 110 F.2d 269, 270 (5th Cir. 1940).

To demonstrate the mischief afoot here, one need only hypothecate the present situation in reverse. Suppose that a worker is injured when the Act has no weekly maximum benefit limit. Congress, responding to substantially increased workmen's compensation insurance premiums and business collapses or withdrawals as a consequence thereof, passes legislation which limits weekly benefits to $70.00, including pre-amendment injured workers. Would not that legislation be unconstitutional on both a vested rights and impairment of contract basis? The fact that in the present case one is dealing with a purported statutory increase rather than a statutory decrease and that it is the employer and workmen's compensation carrier rather than the worker who is being victimized should not alter the ultimate conclusion of unconstitutionality.

The District of Columbia Circuit in the instant case, however, failed to address the constitutionalilty of the im-

pairment of contract argument occasioned by the retrospective application of the repeal of §14(m), although specifically raised. It did reject the due process argument based on *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1974), in which the Court held that a statute imposing liability for Black Lung benefits retrospectively was not violative of due process. Two observations, however, make *Usery* clearly distinguishable from the instant case.

First, the statute in *Usery* was specifically designed to be retroactive. The due process challenge was thus directed at Congress' exercise of its prerogative to pass a retroactive law. As *Usery* points out, *Id.* at 15, there is no doubt that Congress has the legal power to pass such an act. The *Usery* holding thus comes into play only after it is clearly determined that the intent of the legislature was to make the statute retroactive. The case does not address the presumptions discussed in *Bradley* relating to statutory construction and interpretation. It deals only with the issue of legality where the intent is clearly expressed.

Secondly, one must consider the targets of the *Usery* holding. The Court held there that the retroactivity was rational and not unjust because it spread the costs of the employer's disabilities to "those who profited from the fruits of their labor — *the operators and coal consumers,*" *Id.* at 78 (emphasis added). There is no mention of an insurance carrier or any other type of indemnitor whose contract obligations would be astronomically expanded by the change in law.

In the instant case, neither petitioner had exploited the worker in a way that would cause his injuries and justfiy such cost spreading. Without such an overriding factor, the vested contract rights should be honored. *Usery* thus closes the Fifth Amendment door only far enough to shut out cases which rationally redistribute economic costs and

benefits. It does not attempt to address the issue of contract infringement or the spreading of costs to others beyond the employment relationship and is thus clearly distinguishable from the instant case.

To permit the District of Columbia Circuit's decision to stand in clear conflict with this Court's prior pronouncements is to cast into doubt not only what Congress must or must not say with respect to future legislation but it also would have the same chaotic effect on current or proposed state legislation. This should not be permitted to occur where the result surely will be to cast doubt and uncertainty on same and spawn future litigation *ad infinitum*. This Honorable Court should act now to clarify the situation even if it is ultimately concluded that an affirmance is in order.

II

TO INSURE UNIFORMITY IN ADMINISTRATION OF THE LONGSHOREMEN'S ACT IN VIEW OF CONFLICT BETWEEN DISTRICT OF COLUMBIA CIRCUIT AND THE BENEFITS REVIEW BOARD

A second and equally significant reason for this Honorable Court to grant certiorari in this cause is that the question of the retroactivity of §14(m) is now ripe for Supreme Court guidance to insure national uniformity in the administration of the Longshoremen's and Harbor Workers' Compensation Act. There now exists a clear conflict between the District of Columbia Circuit's views on the effect of the §14(m) repeal and that of the Benefits Review Board, the initial reviewing body which reviews Administrative Law Judge decisions arising under the Longshore Act nationally. Since January 30, 1975, the Board has consistently held it is not retroactive. *Hayes v. Independent Stevedoring Co.*, 1 BRBS 264 (1975);

Mendenhall v. Northwest Marine Iron Works, 1 BRBS 485 (1975); *Salusky v. Army Air Force Exchange Service,* 3 BRBS 22 (1975); *Swann v. George Hyman Construction Co.,* 3 BRBS 490 (1976); *Vinson v. Avondale Shipyards,* 8 BRBS 597 (1978); *Correia v. General Dynamics Corp.,* 8 BRBS 602 (1978); *Davis v. George Hyman Construction Co.,* 9 BRBS 127 (1978).

The Board, in addition, has applied this Court's traditional prospectivity/retroactivity approach in virtually every case in which the effect of the 1972 amendments was challenged. See *Edwards v. Zapata Offshore Co.,* 5 BRBS 429 (1977) [§6(d) amendment held prospective only]; *Mitchell v. Lake Charles Stevedores, Inc.,* 5 BRBS 777 (1977) [§6(b) amendment held prospective only].

Because of the Board's firm stance against the retroactivity of the 1972 amendments to the Act, it is unlikely that it will willingly apply the District of Columbia Circuit's Hastings decision nationally, although, of course, it must adhere to the Court's holding when presented with the §14(m) issue under the District of Columbia Act. When the issue arises under the Longshoremen's Act in other jurisdictions, however, the Board is free, and has done so in the past, to utilize its own interpretation. This likely conflicting application of the 1972 amendments will thus engender chaos among the non-District of Columbia jurisdictions, and this can only be rectified by granting the writ of certiorari prayed for herein.

An example of the type of confusion that can occur and has occurred when the Board and the Courts of Appeal interpret the Act differently can be found in the cases discussing jurisdictional requirements imposed by the §2(3) "status" provision and the §3(a) "situs" provisions. The Board initially read these provisions broadly to give the Act expansive jurisdiction, and it specifically rejected

the "moment of injury" test, *Coppolino v. International Terminal Operating Co., Inc.,* 1 BRBS 205 (1974), and the "point of rest" theory. *Avvento v. Hellenic Lines, Ltd.,* 1 BRBS 174 (1974). Some of the Circuit Courts of Appeal followed the Board's reasoning. See, *Stockman v. John T. Clark & Son of Boston,* 539 F.2d 264 (1st Cir. 1976); *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35 (2nd Cir. 1976). The Fifth Circuit, however, used the "moment of injury test" while rejecting the "point of rest" analysis. *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976).

The Third and Ninth Circuits formulated their own jurisdictional tests. *Sea-Land Service, Inc. v. Director, OWCP,* 540 F.2d 629 (3rd Cir. 1976); *Weyerhauser Co. v. Gilmore,* 528 F.2d 957 (9th Cir. 1976). In a later case the Board criticized the Ninth Circuit's analysis and declined to follow it. *Stewart v. Brown & Root, Inc.,* 7 BRBS 356 (1978). The Fourth Circuit, alone among the Courts, adopted the "point of rest" theory and again the Board refused to follow it. *I.T.O. Corp. of Baltimore v. Benefits Review Board,* 529 F.2d 1080 (4th Cir. 1975). Because of this confusion, certiorari was granted in the Second Circuit's *Pittston* case which was recaptioned *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). As in the instant case, review by the Supreme Court was necessary to insure uniform administration of the Act.

The same problem occurred with respect to death benefits under the amended Act with the Board and Ninth Circuit holding there was no ceiling, *Richman v. Hudson River Dayline, Inc., 8 BRBS 273 (1978); Director, OWCP v. Rasmussen, et al.,* 567 F.2d 1385 (9th Cir. 1978), and the Third Circuit and the District of Columbia Circuit concluding to the contrary, *Director, OWCP v. O'Keefe,*

545 F.2d 337 (3rd Cir. 1976); *Director, OWCP v. Boughman,* 545 F.2d 210 (1976). The Board declined to alter its position, this Court granted certiorari, and affirmed the Board's position. *Director, OWCP v. Rasmussen,* 440 U.S. 29 (1979).

Conflict and non-uniformity among the other Circuits will result from a non-review of the Hastings case. Many Circuit and District Courts have already held that the 1972 amendments fixed the parties' rights as of the date of the injury and were intended to be applied prospectively only. In *Addison v. Bulk Food Carriers, Inc.,* 489 F.2d 1041 (1st Cir. 1974), for example, the Court was called upon to consider whether or not the indemnity agreements which were voided under §5 of the amendment Act were to be given prospective or retrospective application. The Court traced the legislative history and expressions of Congressional intent and concluded that the amendments should be given prospective application only.

Addison emphasized that the critical data was the date of the longshoreman's injury. It was then that his rights vested against the stevedore. Although the third-party complaint seeking indemnity was filed after th 1972 amendments were effective, the parties' rights were considered as having been fixed in July of 1972 when the claimant there was injured.

A similar approach was adopted in the case of *Bell v. Isthmian Lines, Inc.,* 363 F.Supp. 156, 159 (D.Fla. 1973), where the Court stated:

> "Further evidence of Congressional intent that the section is to be applied prospectively is the fact that the amendments also improved the benefit structure of the Act. The maximum benefit amounts were increased, along with other

changes in calculation of benefits and survivor benefits. . . ."

Other Federal Courts have come to the same conclusion. See *Rios v. Empresas Lineas Maritimas Argentinas v. Fred Imbert, Inc.*, 575 F.2d 986 (1st Cir. 1978); *Lebel v. Bath Iron Works*, 544 F.2d 1112 (1st Cir. 1976); *Murphy v. Woods Hole, Martha's Vineyard & Nantucket SS Auth.*, 545 F.2d 235 (1st Cir. 1976); *Landrum v. Air America, Inc.*, 534 F.2d 67 (5th Cir. 1976); *Uglem v. Foss Launch & Tug Co.*, 541 F.2d 1378 (9th Cir. 1976); *Yochim v. Lykes Bros. SS Co. Inc.*, 444 F.Supp. 6 (D.La. 1977); and *Scalafini v. Moore, McCormack Lines, Inc.*, 388 F.Supp. 897 (D.N.Y. 1975). Research has disclosed no other views comporting with those of the District of Columbia Circuit.

If the decision of the Court of Appeals here is allowed to stand it will have a significant impact on potentially thousands of cases. As far as counsel for petitioners has been able to ascertain, the Department of Labor has no readily available statistics which directly disclose how many case will be affected by the Court's holding, but figures are available, however, which demonstrate the large number of cases which could be affected by the decision. The following are combined statistics from both the Longshoremen's and District of Columbia Acts, gleaned from annual reports and annual statistical reports of the Department of Labor which counsel has been able to obtain reflecting the administrative file closures – not necessarily claims which could not be reactivated. Cf. *Intercounty Construction Corp. v. Walter, et al.*, 422 U.S. 1 (1975).

Year	Final Disposition of Injury Cases Number of Cases Closed
1963	107.261
1964	112,956
1965	122,439
1966	122,239
1967	114,587*
1968	114,587*
1969	114,939
1970	109,945
TOTAL	918,953

*Average figures

Assuming the number of cases remained approximately the same in 1971 and 1972, over one million cases could potentially be affected.

Any of these cases where no formal order terminating benefits has been entered or where an injury to the body of the whole has been sustained with less than $24,000.00 having been paid is potentially reviewable because of the District of Columbia Circuit's retroactive application of § 14(m). When the number of potential cases is multiplied by the dollar amount of additional benefits that employers and insurance carriers may have to provide, with the latter being unable to recoup premiums for same and to spread the cost factors retroactively, the impact of the Court's decision becomes staggering.

Furthermore, in support of the argument dealing with the impact of the §14(m) repeal, and not by way of augmentation of the record, the Court's attention is invited to the attached statement from the National Council on Compensation Insurance reflecting a $17 million dollar

premium cost to District of Columbia employers had it been known that the statute was to be retroactively applied. (App. 64a)

In fact counsel for petitioners has already received a substantial number of calls from carrier attorneys both within and without the Metropolitan Washington area expressing great concern over the decision on behalf of their clients, and urging, among other things, Supreme Court review. In addition, counsel's most recent discussions with the District of Columbia Deputy Commissioner's office, the Director OWCP's office, and the Solicitor of Labor's office, on June 10, 1980, and June 11, 1980, have disclosed that no action is presently contemplated to implement the Hastings ruling nationally pending Supreme Court disposition of the present petition for certiorari.

Because of the obvious administrative problems previously alluded to plus the number of cases potentially affected by the Hastings decision and the incalculable amount of injury it could impose on employers and insurance carriers, petitioners respectfully request this Honorable Court to grant this petition.

III

TO INSURE THE PROPER SCOPE OF JUDICIAL REVIEW WHERE THE COURT OF APPEALS DEPARTED FROM SUPPREME COURT PRECEDENT

This Court has held on numerous occasions, under the Longshoremen's and Harbor Workers' Compensation Act, that where the evidence before the Deputy Commissioner permits the drawing of diverse inferences, his determinations as fact finder are to be sustained on appeal unless forbidden by law or irrational. *Voehl v. Indemnity*

Insurance Co., 288 U.S. 162 (1933); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). In addition, if those findings are supported by substantial evidence, considering the record as a whole, his decision must be affirmed. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *Banks v. Chicago Grain Trimmers Assn.*, 390 U.S. 459 (1968); *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951).

The Court of Appeals here, however, in considering the employee's average weekly wages from which his compensation rate is to be derived, when Mr. Hastings was working part time prior to his second accident, failed to mention these well-settled restricted review principles. In fact, it is clear from the opinion that the Court simply substituted its judgment for that of the Administrative Law Judge (ALJ) as if it were at liberty to make independent findings of fact – in total derogation of the foregoing principles.

The record undisputedly reveals that after his April 1, 1971, stroke, Mr. Hastings returned to part time work for the same employer on February 8, 1972, and he continued to work there in that fashion until he had a pulmonary emboli and phlebitis in March of 1974 which rendered him unable to work thereafter – a period in excess of two years. The task of the Administrative Law Judge was to determine Mr. Hastings' average weekly wages at the time of his second accident in accordance with §10 of the Act.

In the introductory language of that portion of the statute it is provided as follows:

"§910. Determination of Pay.

> "Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> * * * * * * * * * * * *
>
> "(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.
>
> "(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings. . . ." [Emphasis added]

It has been consistenly held that §10(c) of the Act is to be applied where the worker's employment is part time. *Allen v. Sea-Land Service, Inc.,* 5 BRBS 41 (1976); *Palacios v. Campbell Industries,* 8 BRBS 692 (1978); *Johnson v. Britton,* 290 F.2d 355 (D.C.Cir. 1961); *Andrew F. Mahony Co. v. Marshall,* 46 F.Supp. 539 (D.Wash. 1931), aff'd. 56 F.2d 74 (9th Cir. 1932); *White v. O'Hearne,* 338 F.2d 464 (4th Cir. 1964); *Todd Shipyards v. Director, OWCP,* 545 F.2d 1176 (9th Cir. 1976).

Thus, the Administrative Law Judge is given broad discretion to determine an average weekly wage which shall reasonably represent the annual earning capacity of the injured employee. *Tri-State Terminals, Inc. v. Jesse,* 596 F.2d 752 (7th Cir. 1979); *Todd Shipyards v. Director, OWCP,* 545 F.2d 1176 (9th Cir. 1976); *Wise v. Horace Allen Excavating Co.,* 7 BRBS 1052 (1978); *Hatchett v. Duncanson-Harrelson Co.,* 8 BRBS 173 (1978). The claimant's actual earnings may be used if reasonable. *Allen v. Sea-Land Services, Inc.,* 5 BRBS 41 (1976).

As the figures in the slip opinion from the Court of Appeals disclose (footnote 2, App. 3a), the claimant had his ups and downs during the twelve months of work prior to his second injury. One month he worked more than 80 hours, one more than 70, three more than 60, four more than 50, one more than 40, two more than 30, and one with no work. There was no regular pattern of continued increase, decrease, or a plateau being reached. After taking all of these variables and fluctuations into account, the ALJ concluded, with the Benefits Review Baord affirming, that the $9,200.00 earned by the claimant during the 52 weeks before his second accident reasonably reflected Mr. Hastings' annualized earning capacity. Based on this assessment, he concluded that the claimant had an average weekly wage of $177.00 at the time of his second accident.

The Court of Appeals criticized and reversed the ALJ and the Board on the alleged basis that what the ALJ did was simply to mechanically apply the formula for benefit computation (App. 22a); yet there is no support for such statement anywhere in the record. Rather this simply reflects the Court's disagreement with the fact finder, but under familiar review principles this should not be the subject of a reversal unless clearly erroneous, irrational, or not in accordance with law.

The Court, assuming the role of fact finder, baldly states that the claimant's actual working capacity prior to his second accident is best measured by the amount he worked during the two or four week period immediately preceding same. How and why it is in a superior position to make that determination contrary to the statute and the duty of the ALJ does not readily appear. Suppose the claimant, after having made a good recovery, then had a downturn as his pre-existing condition deteriorated. Would the Court then conclude that that abbreviated two to four week period just before his second accident was reasonably representative of his pre-accident wage earning capacity?

The point is that a twelve month period is initially mandated by the statute, and thus serves as a legislative guide post for the ALJ in determining a worker's average weekly wages. The 52 week period which the ALJ utilized here was some eleven months after Mr. Hastings had returned to work. In calendar years 1972 and 1973, the claimant averaged close to eleven work hours per week. The Court's statement that the claimant demonstrated he could work an increasing number of hours after his stroke is only partially accurate. For example, in April of 1972, but two months after his initial return to work, Mr. Hastings worked 58 hours and in November of that same year he worked 61 hours. Yet, in October of 1973 he did not work at all, and in December of 1973 he worked but 38 hours.

Because of these type fluctuations, the ALJ no doubt concluded that the twelve month period outlined by the statute was the most reasonable. He had the opportunity to see the claimant, hear live testimony, and fully evaluate all of the relevant medical evidence. Since the responsibility for making factual determinations and drawing reasonable inferences therefrom is entrusted to him, and his con-

clusion is neither irrational or forbidden by law, and is supported by substantial evidence, considering the record as a whole, this Court should not allow the Act's well-established review principles to be encroached upon, as here, for in the last analysis it simply makes a mockery of the administrative process. This Court should grant the petition for certiorari on this score also because of the District of Columbia Circuit's clear departure from this Court's admonitions dealing with the restricted scope of judicial review under the Act.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1759

ROBERT HASTINGS, PETITIONER

v.

EARTH SATELLITE CORPORATION
and CONTINENTAL CASUALTY COMPANY,
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U.S. DEPT. OF LABOR, RESPONDENTS

Petition for Review of an Order of the
U.S. Dept. of Labor Benefits Review Board

Argued October 23, 1979

Decided March 19, 1980

Tersh Boasberg for petitioner.

John C. Duncan, III, for respondents Eartn Satellite Corp., et al.

Mary A. Sheehan, Attorney, Department of Labor, for respondent Director, Office of Workers' Compensation Programs.

Also *Cornelius S. Donoghue, Jr.*, and *Gilbert T. Renaut*, Attorneys, Department of Labor, entered appearances for respondent Director, Office of Workers' Compensation Programs.

Also *William J. Donnelly, Jr.*, entered an appearance for respondents Earth Satellite Corp., et al.

Before: McGOWAN and WILKEY, *Circuit Judges*, and GESELL *, *United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* McGOWAN.

McGOWAN, *Circuit Judge*: This case presents for review an order of the United States Department of Labor's Benefits Review Board awarding compensation to petitioner Robert Hastings. At issue are complex questions of calculating benefits under the District of Columbia Workmen's Compensation Act.[1] For the reasons set forth below, we think the Board erred in certain respects in computing petitioner's benefits. We therefore reverse in part, and remand.

I

The facts of this case, set forth here as found by an Administrative Law Judge (ALJ), are not challenged in this petition for review. Petitioner Hastings was the secretary, treasurer, and comptroller of Earth Satellite

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] The District of Columbia Workmen's Compensation Act, D.C. Code § 36-501 *et seq.*, incorporates by reference the substantive provisions of the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1976) (the Act).

Corp., a District of Columbia consulting firm. His annual salary was $30,000. Earth Satellite interprets aerial photography for private companies and the government. Earth Satellite, in which Hastings had invested heavily, needed an infusion of new capital early in 1971. Hastings, under great pressure to put together a financial package, found himself working an average of 60 hours per week.

Hastings suffered a stroke on April 1, 1971. After hearing conflicting medical testimony, the ALJ found that the stroke was caused by job stress.

Hastings convalesced for ten months. He returned to work on February 8, 1972, and was employed on a part-time basis for about two years. Earth Satellite paid Hastings at the same rate as his previous salary, prorated for the number of hours he worked. Although Hastings worked an average of only 50 hours per month over the two-year period, his time on the job gradually increased between 1972 and 1974.[2]

In March 1974, however, Hastings experienced shortness of breath. He was hospitalized on March 14, and nearly died. A physician determined that Hastings was

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[2] Hastings reported the following number of working hours:

1972					
Feb.	21	Nov.	61	July	50
March	53.5	Dec.	50	Aug.	55
April	58			Sept.	50
May	53.5	1973		Oct.	0
June	43.5	Jan.	49.5	Nov.	67
July	49.5	Feb.	52	Dec.	38
Aug.	50	March	33		
Sept.	31.5	April	55	1974	
Oct.	31	May	66	Jan.	81
		June	61	Feb.	77

J.A. 75-82. Some months in which lesser amounts of work were done may be attributable to vacation periods. *See* Reply Brief for Petitioner, Appendix A.

suffering from pulmonary emboli and phlebitis. The ALJ found, on the basis of conflicting medical evidence, that both ailments were caused by prolonged periods of sitting at work. Hastings is susceptible to a relapse of phlebitis if he sits for a prolonged period. Moreover, he continues to suffer residual effects of the stroke: fatigue, speech impairment, and reduced mental acuity. For all these reasons, Hastings' physician advised him not to resume similar work.[3]

II

Hastings filed separate claims for the stroke and the emboli.[4] The ALJ heard evidence on both claims at the same hearing. The ALJ thought that compensation should be calculated by dividing Hastings' disabilities into three phases. The first was the period between April 1, 1971, and February 8, 1972. That was the time Hastings convalesced following his stroke. The second was the period between February 8, 1972, and March 14, 1974, when Hastings worked part-time for Earth Satellite. The third was the period after March 14, 1974, during which Hastings has been unable to work.

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[3] Medical evidence received by the ALJ suggested that Hastings was capable of, and indeed might benefit from, part-time work delivering packages on foot. The employer carries the burden of showing the availability of such alternative work, but no evidence on this subject was offered. The ALJ, therefore, properly treated Hastings as totally disabled.

[4] The claim form for the emboli was filed March 6, 1975. The claim form for the stroke was filed June 14, 1976. The ALJ held that the one-year statute of limitations did not bar the stroke claim because Earth Satellite had waited until April 22, 1976, to file required accident report forms. The forms should have been filed within ten days of the stroke. 33 U.S.C. § 930(a) (1976). The ALJ held that the statute of limitations was tolled until the employer reported the accident, *id.* § 930(f).

The Act requires the ALJ to calculate benefits by assessing both the magnitude and duration of Hastings' disability. Phase I was a period of "temporary-total" disability, according to the ALJ. Compensation for this kind of disability is set by section 8(b) of the Act, 33 U.S.C. § 908(b) (1976).[5] That section authorizes the payment of §70 [6] or two-thirds of the claimant's average weekly wage, whichever is the lesser amount. Hastings' average weekly wage, based on his prior annual salary of $30,000, was about $577. The ALJ therefore awarded Hastings the statutory maximum of $70 per week for Phase I of his disability.

Phase II was characterized as a period of "permanent-partial" disability. Compensation for this kind of disability is governed by section 8(c) of the Act, 33 U.S.C. § 908(c) (1976).[7] That section authorizes payment of

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[5] Section 8(b) provides:

> Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

[6] Section 6(b) of the Act, 33 U.S.C. § 906(b) (1970; Historical Note, 1976), formerly limited recovery to $70 per week. That provision was repealed in 1972, Pub. L. No. 92-576, § 7(a), 86 Stat. 1252, and replaced with limitations indexed to increases in the national average weekly wage. *See* 33 U.S.C. § 906(b) (1976). The parties agree that the $70 limitation, not the changes wrought by the 1972 amendments, is applicable to the compensation award for disability resulting from the stroke. Relevant to another issue in this appeal, *see* text accompanying note 9 *infra*, is the fact that the maximum was $210.54 for injuries occurring between October 1, 1973, and September 30, 1974.

[7] Section 8(c)(21) provides, in pertinent part:

> (c) Permanent partial disability: In case of disability partial in character but permanent in quality . . .:
>
> • • • •

[Continued]

$70 or two-thirds of the difference between the claimant's former earning capacity and his current average weekly wage; once again, the lower amount is to be paid. *Id.* § 908(c)(21); *see* note 6 *supra*. The ALJ thought there was no need to determine the extent of Hastings' lost earning capacity because the $70 ceiling was clearly applicable. Accordingly, the ALJ awarded Hastings $70 per week for Phase II.

Phase III, the period following the emboli, was deemed by the ALJ to be a period of "permanent-total" disability. Compensation for this kind of disability is governed by section 8(a) of the Act, 33 U.S.C. § 908(a) (1976).[8] The statute requires paying the lesser of $210.54[9] or two-thirds of the disabled person's "average weekly wages."[10]

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[7] [Continued]

> (21) . . . [C]ompensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

[8] Section 8(a) provides, in pertinent part:

> Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability.

[9] *See* note 6 *supra*.

[10] The term "average weekly wages" is defined in section 10(d) of the Act, 33 U.S.C. § 910(d) (1976), as one fifty-second part of the worker's average annual earnings. The average annual earnings are computed in the following manner:

> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during

Hastings earned $9,228.80 in the 12 months preceding the emboli. The ALJ calculated Hastings average weeekly wages simply by dividing $9,228.80 by 52: $177.48 per week. The ALJ thus awarded Hastings two-thirds of that amount—$118.32—each week for life as compensation for the permanent-total disability.

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substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Section 10 of the Act, 33 U.S.C. § 910 (1976).

The ALJ further ordered that the Phase II permanent-partial disability award (resulting from the stroke) should end at the time the Phase III permanent-total disability award (following the emboli) began. The ALJ held, finally, that Earth Satellite was liable only for 104 weeks of Phase III payments, and that the "special fund" established by the Act [11] must assume the obligation after 104 weeks.

III

Both Hastings and the Director, Office of Workers' Compensation Programs (the Director), appealed the ALJ's decision to the Benefits Review Board (the Board). Hastings contended that the ALJ erred in computing the salary upon which compensation should be based. The Director argued that the ALJ erred (1) in requring the special fund to assume part of the employer's liability, and (2) in terminating the permanent-partial compensation for the stroke on the date Hastings suffered the emboli.

The Board rejected Hastings' argument, and the Director's first argument, and affirmed the ALJ in each respect. The Board did, however, accept the Director's second argument and endorsed concurrent awards for permanent-partial and permanent-total disability. The

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[11] Section 44 of the Act, 33 U.S.C. § 944 (1976), establishes a "special fund" from which certain payments are made pursuant to the Act. The special fund is composed of money paid by insurers and employers each year to spread the risk of large disability liabilities. *Id.* § 44(c), 33 U.S.C. § 944(c) (1976). The Act authorizes payments from the fund, *inter alia*, to a worker who, after resuming work following a permanent-partial disability, suffers permanent-total disability attributable to both injuries. *Id.* § 8(f), 33 U.S.C. § 908(f) (1976). Under section 8(f), the special fund takes over payments to the worker after the employer has made 104 weeks of disability payments for the second injury.

Board, accordingly, modified the ALJ's decision by requiring the employer to continue to pay $70 per week for permanent-partial disability until $24,000 had been paid,[12] notwithstanding the commencement of payments for permanent-total disability. We briefly summarize each of these decisions.

A. *The Salary Basis for the Permanent-Total Disability Award*

Hastings contended that the ALJ erred in determining the salary basis of payments for permanent-total disability. Hastings was earning $30,000 per year at the time of the 1971 stroke, and he argued that this figure, rather than his part-time earnings between the stroke and the emboli, should have been the basis for a permanent-total disability award.

The Board disagreed. It noted that the statute authorized payment of two-thirds of the claimant "average weekly wages." *See* sections 8(a), 10 of the Act, 33 U.S.C. §§ 908(a), 910 (1976), *quoted in* notes 8, 10 *supra*. The Board held that the ALJ correctly computed average weekly wages of $177.48 by dividing Hastings' earnings for the year preceding the emboli—$9,228.80—by 52. The Board thought this calculation was compelled by the language of the statute, namely, that the basis for compensation is the average weekly wage of the injured employee "*at the time of the injury*." Section 10(d) of the Act, 33 U.S.C. § 910(d) (1976) (emphasis added). That Hastings *formerly* earned a much higher salary was irrelevant, the Board held.

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[12] Section 14(m) of the Act, 33 U.S.C. § 914(m) (1970; Historical Note, 1976), limited recovery for disability (other than permanent-total disability or death) to $24,000. That provision was repealed in amendments to the Act in 1972 (the 1972 Amendments). Pub. L. No. 92-576, § 5(e), 86 Stat. 1252 (1972).

B. *The Liability of the Special Fund*

When a worker with a permanent-partial disability becomes totally and permanently disabled because of a combination of both disabilities, the employer at the time of the permanent-total disability is liable only for 104 weeks of compensation, *id.* § 8(f)(1), 33 U.S.C. § 908(f)(1) (1976), and the special fund assumes responsibility for the remaining payments, *id.* § 8(f)(2), 33 U.S.C. § 908(f)(2) (1976). The ALJ attributed Hastings' permanent disability to the combined impact of his earlier stroke and the subsequent, distinct attack of phlebitis and emboli. Accordingly, the ALJ ordered the special fund to pay Hastings after Earth Satellite had paid the first 104 weeks.

The Director argued, however, that because the emboli and phlebitis were directly related to the stroke, and not a separate "subsequent injury," Earth Satellite should be liable for the entire permanent-total disability. The Board rejected this argument. It noted that the ALJ had found that the phlebitis and emboli were caused or aggravated by his sedentary desk job. The ALJ had *not* found that the phleblitis and emboli were caused by the stroke. Section 8(f) of the Act requires payments from the special fund to avoid penalizing an employer who hires—or rehires—a handicapped individual. The special fund, not Earth Satellite, therefore must be liable, the Board concluded.

C. *The Length of the Permanent-Partial Award for the Stroke*

The Director next argued that the ALJ erred in terminating the permanent-partial award (resulting from the stroke) at the onset of total disability. The Board agreed, holding that Earth Satellite should have continued to pay $70 per week for permanent-partial disability until the

$24,000 statutory maximum was reached. This approach in effect created a system of concurrent awards, because the permanent-partial award for the stroke was to be paid even during the payment of the permanent-total award following the emboli. The Board held:

> Nothing in the Act indicates that payments on an award for permanent partial disability should terminate when a later injury occurs rendering the claimant permanently totally disabled. The claimant's average weekly wages at the time of the second injury, upon which the award of permanent total disability is based under Section 10 of the Act, 33 U.S.C. § 910, presumably already reflect a reduced earning capacity resulting from the previous injury. The award for the permanent partial disability should not have terminated even though the claimant was later permanently totally disabled.

J.A. 90.

IV

Presented here for review are several questions arising from the Board's decision. We must decide

(1) whether the Board correctly refused to base the permanent-total disability award on Hastings' salary *before* the stroke;

(2) if so, whether the Board's system of concurrent awards for permanent-partial and permanent total disability is authorized by the Act; and

(3) if the basic structure of the Board's award is sound, whether the Board correctly calculated (*a*) the permanent-partial component by limiting it to $24,000; and (*b*) the permanent-total component by basing it on Hastings' average weekly earnings for the year preceding the emboli.

A

We think the Board correctly refused to base the permanent-total disability award on Hastings' salary be-

fore the first injury, the stroke. The Act bases benefit computations on the worker's "average weekly wages." Section 8(a) of the Act, 33 U.S.C. § 908(a) (1976), *quoted in full in* note 8 *supra*. The Act carefully defines that term. It provides, in pertinent part:

> . . . [T]he average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation . . . .

Id. § 10, 33 U.S.C. § 910 (1976) (emphasis added). Where, as here, *two* injuries befall an employee, the employee's earning capacity during the time preceding the second injury must be the basis of computing benefits attributable to the second injury.

Hastings cites section 2(13) of the Act, 33 U.S.C. § 902(13) (1976), as support for his theory that his compensation should be based on his earnings before the first injury. That section provides, in pertinent part:

> "Wages" means the money rate at which the service rendered is recompensed . . . .

Hastings argues that the "money *rate*" paid before the stroke—$30,000 per year—was identical to the "money *rate*" paid after the stroke—$30,000 per year prorated for the number of hours worked.

We think Hastings misinterprets both the Act and the part-time employment arrangement he had with Earth Satellite. Hastings' strained reading of the *definitional* section of the Act cannot be used to subvert the benefits formula carefully specified by section 10. In addition, Hastings confuses the nature of his pay arrangement with the company. He was employed on an hourly basis for an unspecified amount of part-time work. His $14.42 hourly rate was, of course, derived from his prior salary, but he was paid only for the number of hours *actually worked*. Thus, Hastings cannot be deemed to have been

paid at the rate of $30,000 per year, because his earnings would have totalled $30,000 only had he been able to work full time.

B

We think, also, that the Board's scheme of concurrent awards for both permanent-partial disability (for the stroke) and permanent-total disability (for the cumulative effects of both stroke and emboli) was appropriate. This conclusion is compelled by our reasoning in the preceding section of this opinion. In that section, we based compensation for Hastings' permanent-total disability on his diminished earning capacity, not on the $30,000 per year earning capacity he possessed before the stroke. Because compensation for his original loss of earning capacity was already addressed in the permanent-partial award, logic and fairness require that the permanent-partial disability award continue concurrently with the permanent-total award.

A hypothetical makes this clear. Consider a worker earning $10,000 per year. An accident permanently reduces his earning capacity to $6,000. He is awarded compensation based on the $4,000 diminution in his earning capacity. A second accident disables him totally. The second compensation award is based on the $6,000 in earning capacity remaining after the first accident. Terminating the first award at the onset of the second would deprive the worker of compensation for the permanent loss of $4,000 in earning capacity. Paying the two awards concurrently, however, compensates him fully. The sum of the two awards reflects the full $10,000 diminution in earning capacity.

This reading of the Act might give rise to an anomaly, namely, that a twice-injured, permanently disabled worker might receive a larger award than a worker who had become permanently disabled in a single injury. The anomaly could arise because of the ceilings on awards

imposed by section 6(b) of the Act, 33 U.S.C. § 906(b) (1976). In 1974, for example, the weekly ceiling was $210.54. Consider a worker earning $600 per week, who becomes injured and can earn only $300 per week. The worker is entitled to compensation for the diminution of his earning capacity. His weekly compensation is two-thirds of $300, or $200 per week. Suppose now that a second accident befalls the same worker, leaving him totally disabled. Compensation for the second injury is two-thirds of $300, or $200 per week. The sum of the awards, using the concurrent award approach described above, is $400 per week.

Consider now a second worker who, like the first, initially earned $600 per week. Suppose that the second worker, unlike the first, becomes totally disabled in a single accident. The diminution in earning capacity is $600 per week, and recovery ought to be two-thirds of $600, or $400 per week. The section 6(b) maximum, however, limits recovery to $210.54 per week. Thus, one totally disabled worker might obtain $400 per week in benefits while one with equal earning capacity, also totally disabled, obtains barely half that amount. The difference occurs only because the first worker became totally disabled in two consecutive injuries while the second worker became totally disabled in only one.

Concurrent awards for multiple disabilities might, in this unusual case, aggregate to an amount greater than the section 6 maximum for a single totally disabling injury. This specter does not indicate a flaw in the system of concurrent awards; rather, it is caused by the existence of the Act's maximum-payment provisions. Congress is free to amend the statute to eliminate the resulting anomaly.[18]

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[18] The Director's brief suggests a possible statutory amendment to remove the anomaly described in the preceding paragraphs. Congress could provide that, in the event of multiple

We have thus far found appropriate the *structure* of the Board's award, namely, concurrent awards for permanent-partial disability (based on Hastings' earnings before the stroke) and permanent total disability (based on Hastings' earnings from part-time work). Remaining to be decided are the questions (1) whether the permanent-partial award should be limited by the $24,000 ceiling that was repealed after Hastings' stroke, and (2) whether the Board accurately computed Hastings' "average weekly wages" during the period of part-time work for purposes of paying permanent-total disability.

1

Section 14(m) of the Act formely limited permanent-partial recoveries to $24,000. 33 U.S.C. § 914(m) (1970; Historical Note, 1976). That limitation was repealed in 1972, after Hastings suffered his stroke. Pub. L. No. 92-576, § 5(e), 86 Stat. 1252 (1972). The Board thought that, because the stroke preceded the repeal, the limitation was applicable to the permanent-partial disability component of Hastings' award. The Board, accordingly, ordered that payments cease when $24,000 had been paid. We disagree.[14]

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recoveries that would exceed the single-award maximum, the Board should limit compensation for *each* injury to the equivalent percentage of the section 6 maximum. Brief for Director at 19.

[14] We reject Earth Satellite's threshold argument that the question of the retroactivity of section 14(m)'s repeal was not properly preserved for review. The $24,000 limitation did not become relevant until the Board reversed the ALJ by adopting the framework of concurrent awards. (Under the ALJ's approach, the permanent-partial disability payments were to cease at the onset of permanent-total disability. The permanent-partial component never would reach $24,000 under this approach.) Hastings, by raising the $24,000 limi-

The principles by which we must pass upon the retroactivity *vel non* of the repeal of the $24,000 limitation were explained by the Supreme Court in *Bradley v. School Board*, 416 U.S. 696 (1974). We are instructed to apply the amendment unless there is statutory direction or legislative history to the contrary or unless to do so would be manifestly injust. *Id.* at 711.

We find no congressional intention that the repeal not be applied retroactively. The statutory language, to be sure, does not specifically *require* retroactive application of the repeal. We think, though, that the absence of a provision *prohibiting* retroactivity is significant. Congress before 1972 had thrice amended the Act's benefit limitations. Each prior amendment was, by its terms, made inapplicable to injuries or deaths occurring before

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tation issue in this court, has raised it at the first opportunity after the Board's decision made it relevant.

It is true that Hastings should have requested the Board to apply retroactively the repeal of section 14(m) in the event the Board adopted a concurrent award scheme. However, the special circumstances of this case make us disinclined to insist on overly strict procedural requirements. The Board has clearly taken the view that the repeal of section 14(m) should not be applied retroactively. Davis v. George Hyman Constr. Co., 9 B.R.B.S. 127 (1978); Correia v. General Dynamics Corp., 8 B.R.B.S. 602 (1978); Vinson v. Avondale Shipyards, Inc., 8 B.R.B.S. 597 (1978); Swann v. George Hyman Constr. Co., 3 B.R.B.S. 490 (1976); Salusky v. Army Air Force Exch. Serv., 3 B.R.B.S. 22 (1975); Hayes v. Independent Stevedoring Co., 1 B.R.B.S. 264 (1975). It is therefore highly unlikely that the Board would have changed its mind in this case had it again been asked to consider the issue. In any event, the question of the retroactivity of a statutory amendment is purely one of law. We are not disadvantaged under these circumstances in considering the issue ourselves in the first instance, nor can Earth Satellite reasonably claim that it has been prejudiced by our doing so.

the date of enactment.[15] The 1972 Congress, by its silence, deviated from the past practice of specifically providing for nonretroactivity.[16]

It is also useful to consider the kinds of changes wrought by the 1972 Amendments. Some of the changes have been held to apply only prospectively. Others have been applied retroactively. Comparing the nature of the other amendments with the change in law effected by section 14(m)'s repeal makes it apparent that the $24,000 limitation is inapplicable to this case.

Certain of the 1972 Amendments change principles of substantive law. Amendments of this sort affect the rights and liabilities of persons and businesses in the maritime industry. These amendments, *inter alia*, (1) eliminated a shipowner's liability to a longshoreman for injuries caused by the unseaworthiness of the ship,[17] (2) abrogated the shipowner's right of indemnity against the stevedoring company that employed the longshoreman,[18]

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[15] The Act of July 14, 1961, Pub. L. 87-87, § 3, 75 Stat. 203 established the $24,000 limitation repealed in 1972. The prior ceilings were set by the Act of July 26, 1956, c. 735, § 5, 70 Stat. 654, 654 (ceiling of $17,280) and the Act of June 24, 1948, c. 623, § 5, 62 Stat. 602, 603 (ceiling was $11,000, except for certain permanent-partial disability payments that were subject to a $10,000 ceiling). Each of these Acts contained provisions limiting their applicability to injuries occurring after the effective date of the Act.

[16] *Cf.* C&P Tel. Co. v. Director, OWCP, 564 F.2d 503, 510 & n.7 (D.C. Cir. 1977) (discussing earlier amendments to section 8 of the Act).

[17] *See* Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986 (1st Cir. 1978) (holding nonretroactive the amendments to certain portions of section 5(b) of the Act, 33 U.S.C. § 905(b)); Drachenberg v. Canal Barge Co., 571 F.2d 912 (5th Cir. 1978) (same).

[18] *See* Addison v. Bulk Food Carriers, Inc., 489 F.2d 1041 (1st Cir. 1974) (holding nonretroactive amendments to certain portions of section 5(b) of the Act, 33 U.S.C. § 905(b)).

and (3) extended the Act's protection to certain workers engaged in maritime employment who were not previously covered.[19]

Certain other of the amendments, however, dealt not with liability *vel non*, but with the remedy or the mode of its enforcement. The Amendments, *inter alia*, (1) provided for the payment of attorney's fees,[20] and expanded the time limitation for filing compensation claims.[21]

Where Congress fails to make its intentions absolutely clear, courts are much more inclined to apply retroactively amendments directed at the *remedy* rather than changes in *substantive rights*. *See Cooper Stevedoring of Louisiana, Inc. v. Washington*, 556 F.2d 268, 271-73 (5th Cir. 1977). Retroactive modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability. Persons and employers must be able to base their conduct on what they believe the law to be. Retroactive creation of legal responsibilities or abolition of legal rights risks unfairness because the retroactive change confounds the expectations upon which persons acted.

Retroactive modifications in remedy, on the other hand, often do not involve the same degree of unfairness. Such

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[19] *See generally* P.C. Pfeiffer Co. v. Ford, 100 S. Ct. 328 (1979) (discussing the scope of amended section 2(3) of the Act, 33 U.S.C. § 902(3); no retroactivity issue).

[20] *See* Overseas African Constr. Corp. v. McMullen, 500 F.2d 1291 (2d Cir. 1974) (holding retroactive the amendments pertaining to section 28(a) of the Act, 33 U.S.C. § 928(a)); *accord*, Matthews v. Walter, 512 F.2d 941 (D.C. Cir. 1975); Dillingham Corp. v. Massey, 505 F.2d 1126 (9th Cir. 1974).

[21] *See* Cooper Stevedoring of La., Inc. v. Washington, 556 F.2d 268 (5th Cir. 1977) (holding retroactive the amended provisions of section 13(a) of the Act, 33 U.S.C. § 913(a)).

modifications do not transform a legal act into an illegal act, or render one responsible to safeguard someone previously thought to act at his peril. Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known.[22] For this reason, absent contrary direction from Congress, courts are more inclined to apply retroactively changes in remedies than changes in liability.[23] These considerations are particularly powerful in this case. The existence of the $24,000 ceiling in effect allowed the employer to avoid the responsibility for the full costs associated with his enterprise because it deprived his employees of compensation for earning capacity lost in the employer's service. Removing the artificial ceiling, therefore, creates no injus-

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[22] The distinction between retroactive changes in *principles* of liability and changes in *remedies* for such liability does not mean that retroactive changes in remedy cannot also be unfair. They obviously can be so, particularly in the context of insurance. Actuarial calculations are based on the expected *magnitude* of liability in addition to its expected *frequency*. Thus, insurers are harmed when their past premiums prove to be inadequate fully to reflect the increased liability mandated by a retroactive change in remedy. Such is the case with the repeal of section 14(m). Insurers doubtless set their premiums based on the expectation that recoveries would be limited to $24,000.

[23] Our decision in Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976), is consistent with this view. In *Swinton*, we declined to make retroactive certain amendments pertaining to judicial review of compensation decisions. We noted that to hold otherwise in that case could have deprived the claimant of judicial review of his claim because of the running of the statute of limitations, *id.* at 1080 & nn. 24-26, and in any event would have involved waste of resources of the parties and adjudicators. *Id.* at 1080. Nothing in *Swinton*, therefore, stands for a general rule that remedial changes in the law are not to be applied retroactively.

tice. It instead removes an obstacle to fair treatment by "allocat[ing] to the [employer] an actual, measurable cost of his business." *Usery v. Turner Elkorn Mining Co.*, 428 U.S. 1, 19 (1976).

We therefore hold that the repeal of section 14(m) applies retroactively to awards for preamendment injuries that had not reached the statutory ceiling before the effective date of the 1972 Amendments.[24] Hastings' compensation must be paid accordingly.[25]

We acknowledge the numerous Board decisions holding that the repeal of section 14(m) is not retroactive. *See* decisions cited in note 14 *supra*. Courts will defer to great extent to a *policymaking* agency's construction of legislation pertaining to that agency. The Benefits Review Board, however, is not a policymaking agency in this sense.[26] The Board's opinion on the retroactivity issue thus is not entitled to our deference. The Board's view accordingly must fail in light of our own analysis.[27]

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[24] This construction is further supported by the Act's policy of resolving in favor of claimants doubts about questions of fact and law. *See, e.g.*, Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932); Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

[25] Earth Satellite contends that giving retroactive effect to the repeal of the $24,000 limitation would offend due process. This argument is without merit. *E.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976).

[26] Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 48-49 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Term. Co. v. Caputo, 432 U.S. 249 (1977). *Accord*, Tri-State Terms., Inc. v. Jesse, 596 F.2d 752, 757 n.5 (7th Cir. 1979).

[27] Counsel for Earth Satellite at oral argument called to the court's attention two sets of circumstances that, according to Earth Satellite, undercut the Director's capacity to advocate

The final issue to be resolved is the proper calculation of permanent-total disability payments for the period following the emboli. The Act authorizes benefits in the amount of two-thirds of Hastings' average weekly wage, 33 U.S.C. §§ 908(a), 910 (1976), up to a maximum of $210.54. *See* note 6 *supra*. The ALJ noted that, in the year preceding the emboli, Hastings earned $9,228.80. The ALJ simply divided that amount by 52 ($177.48) to calculate Hastings' average weekly wage. Two-thirds of that amount—$118.32—became Hastings' compensation.

Hastings contends that this mechanical application of the statutory formula deprives him of benefits to which he is entitled. He points out that, with occasional setbacks, during his period of part-time work he became

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retroactive application of section 14(m)'s repeal. Earth Satellite suggested, first, that the Director in some sense has acquiesced in the Board's view that the repeal of section 14(m) is nonretroactive by failing to pursue appeals in those prior decisions. Such purported acquiescense, we are told, precludes (or at least renders suspect) the Director's efforts to raise the issue on appeal now. Second, Earth Satellite points out that Ralph Hartman, the present Director, formerly was a member of the Board. While on the Board, Mr. Hartman voted against the retroactive application of section 14(m)'s repeal. Earth Satellite contends that Mr. Hartman's change of position militates in favor of nonretroactivity.

We emphatically disagree on each point. The Director's strategy about what cases to appeal may result from myriad factors, *e.g.*, allocation of staff attorney time, the amount in controversy in a particular case, the prospects of settlement, and others. The Director's litigation strategy is neither a matter of concern to us, nor in any event relevant to the retroactivity *vel non* of the repeal of section 14(m).

The same is true of Mr. Hartman's voting record as a member of the Board. His *position qua advocate* is a product of factors vastly different from those guiding his *opinions qua adjudicator*. For that reason, Mr. Hartman's employment history also is irrelevant to the issues before us here.

able to work an increasing number of hours per week.[28] We are told that calculating disability payments based on Hastings' average earnings for the year preceding his stroke insufficiently recognizes his greater activity at the end of the year.

We agree. Concededly, the ALJ and the Board calculated Hastings' benefits in accord with the literal terms of the statutory formula, *id.* §§ 910(a), 910(d), and we are loath to criticize an administrative agency for that. The statute does not, however, elevate mechanical computation above common sense. An ALJ can, and should, adjust the average weekly wage calculation to award benefits that accurately reflect the claimant's true earning capacity.

The existence of this kind of flexibility is apparent both from the statute itself, and decisions construing it. Section 10(c) of the Act, 33 U.S.C. § 910(c) (1976), provides:

> (c) if . . . the foregoing method[ ] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such *average annual earnings shall be such sum as . . . shall reasonably represent the annual earning capacity of the injured employee.*

(Emphasis added). This section explicitly recognizes that the mechanical formula for benefit computation must be disregarded where the formula would distort a claimant's actual earning capacity.[29]

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[28] *See* note 2 *supra.* For example, Hastings averaged 46 hours of work per month during the first four months of part-time work. By comparison, during the last four months of part-time work, he averaged about 66 hours.

[29] Similarly, section 10(e) of the Act, 33 U.S.C. § 910(e) (1976), specifically recognizes that a minor's wages "should be expected to increase" over time. The statute, accordingly,

Appellate cases make clear that section 10(c) requires the ALJ to reject mechanical calculations when necessary to award benefits commensurate with a claimant's true earning capacity. The Court of Appeals for the Seventh Circuit recently decided one such case. *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752 (7th Cir. 1979), involved the 1974 injury of one Jesse, longshoreman. He had earned $2,758.74 in the 52 weeks preceding his injury. The ALJ computed benefits based on that figure, but the Benefits Review Board reversed. The Board noted that the year following Jesse's injury was a boom year for longshoremen in his town. Jesse's former co-workers earned approximately three times more in 1974 than they had in 1973. The Board held that Jesse was entitled to compensation based on this increase in earnings, because he would have been able to earn the greater amount had he not been injured.

The Seventh Circuit affirmed the Board. It stated that it would be unjust "to compute loss of earning power on facts which do not realistically reflect it." *Id.* at 758. The court quoted the Board's opinion with approval:

> The term "earning capacity" connotes the *potential* of the injured employee to earn and is not restricted to a determination based on previous actual earnings.

Id. at 757 (emphasis in original).

Similarly, we think Hastings' "potential to earn" at the time of his final collapse is not well measured by his earnings as much as 12 months earlier. At oral argument of this case, Judge Wilkey proposed an analogy that we think is useful. Judge Wilkey observed that one would not gauge the abilities of a weightlifter in training by examining his performances a year before the date of

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instructs the ALJ to consider adjusting upward the average weekly wage computation to reflect more accurately the minor's true earning capacity. *Id.*

a competition. The amount he can lift is much more accurately reflected by his most recent performances.

So it is, we think, with a worker recovering from a debilitating stroke. Hastings showed he could work an increasing number of hours during the period following his stroke. Hastings' actual working capacity at the time of the emboli is best measured by the amount he worked during the two- or four-week period immediately preceding the emboli.[30] Failure to calculate earning capacity

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[30] Double-accident situations carry the potential for mischief in computation in cases, unlike this one, in which the payments are ordered in separate adjudications. Consider a worker earning $10,000 per year. Suppose one injury befalls him. During the first year after the accident he earns $4,000. His disability claim is litigated, and he receives compensation reflecting the $6,000 diminution in earning capacity. As these compensation payments roll in, he gradually increases his working hours until he earns at the rate of $8,000 per year. Suppose, now, that another injury befalls him and permanent-total disability ensues. How should disability payments now be calculated?

His permanent-total disability payments should reflect his $8,000 per year capacity at the time of the second accident. That, however, would permit "double-dipping" of a sort, because his aggregate disability payments would be based on the loss of $14,000 in earning capacity—$6,000 for the first accident, and $8,000 for the second. This sum represents more earning capacity than he had to begin with. In cases such as this, the award modification mechanism established by the Act should be invoked. 33 U.S.C. § 922 (1976). The initial award, based on a $6,000 loss in earning capacity, resulted in overpayments. The first award should be reduced prospectively to reflect a permanent loss of $2,000 in earning capacity. The claimant concurrently should receive an award for the permanent loss of $8,000 in earning capacity.

Changes in earnings after adjudication can be predicted to some extent by the careful use of medical testimony at hearings. But medical testimony can be incorrect. When this

in this manner produces benefits that poorly measure the earning capacity that he had in fact achieved. The refusal properly to use the flexibility provided by section 10(c) is an abuse of discretion that requires remand.

We do not, of course, hold that an ALJ must reject the normal formula whenever there is a prospect of increased earnings in the future. An employer need not pay a claimant more than his current earnings on the speculative possibility that the claimant might have earned more money in the future had injury not occurred. The instant case, however, involves no speculation. All we require is that where, as here, an employee demonstrates a progressive increase (or decrease) in earnings in the year immediately preceding an injury, compensation should not be based on earnings received as much as 12 months before the injury. Instead, a compensation award should be fixed by recognizing the trend in earnings by examining most closely the earnings immediately preceding the injury.

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occurs, adjustments should be made, pursuant to the statutory procedures, to avoid injustice resulting from initially incorrect factual determinations. *See generally* O'Keeffe v. Aerojet General Shipyards, Inc., 404 U.S. 254 (1971).

The problems discussed in this footnote, of course, do not now confront us because Hastings' compensation for both injuries was determined in a single adjudication. For this reason, we are able to see in hindsight the extent of the disability caused by Hastings' first injury by examining his work record up to the onset of total disability. No prospective recomputation of Hastings' permanent-partial award is necessary in this case because Hastings received the statutory maximum of $70 for the stroke. That award would not change even if the extent of disability caused by the stroke were computed to reflect his increased working capacity demonstrated immediately before the emboli.

We conclude, in sum, that the Board adopted the correct *framework* for the payment of Hastings' benefits: concurrent awards for permanent-partial disability (running from the time of the stroke) and permanent-total disability (running from the occurrence of the emboli). We think, however, that the Board erred in setting the *dollar amount* of the award in each part of the concurrent-award framework.

First, the Board incorrectly applied the $24,000 ceiling to the permanent-partial award. That ceiling had been repealed and, for reasons set forth above, was inapplicable to Hastings' claim. Second, the Board incorrectly set Hastings' permanent-total disability award by failing accurately to assess his earning capacity immediately before the emboli.

Accordingly, the order of the Board is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.[31]

It is so ordered.

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[31] Hastings also claims that he is entitled to attorney's fees, penalty payments, and interest. We affirm the Board's decision in certain respects, but find that we are unable to rule on certain others.

Attorney's fee. Hastings objects to the Board's reduction of his requested attorney's fee for work done at the Board level. Hastings also seeks an attorney's fee for work done in this court.

We defer consideration of the latter pending receipt of a timely, documented, motion for fees in this court. Until that is submitted, a request for fees for work done before this court is premature.

We affirm the Board's award of attorney's fees for work done before it. Our review of that award is limited to an inquiry into whether the award was arbitrary or capricious. The Board noted that the primary theory under which Hastings prevailed before the Board—the system of concurrent

awards—was that advocated by counsel for the Director. The Board reduced Hastings' attorney's fee award accordingly. We think that counsel for the Director, both before this court and before the Board, has performed superior oral and written advocacy. This has benefitted Hastings in important respects (although the Director's position was not aligned with that of Hastings on every issue). We agree with the Board that this is relevant to the amount of fees that should be awarded Hastings' counsel. Accordingly, we cannot say that the Board's award of fees to Hastings' counsel was arbitrary or capricious, and we affirm.

Penalty Payments and Interest. The ALJ noted that a penalty of 10% is payable on compensation awards not paid within 14 days after such became due, unless the employer timely filed notice of controversion. J.A. 26-28; section 14(e) of the Act, 33 U.S.C. § 914(e) (1976). The ALJ also ordered the payment of 6% interest on any such overdue payments. The Board affirmed the ALJ in each respect, but no amount was set by either the ALJ or the Board. The record before the court does not reveal what payments have been made by the employer, whether the employer timely filed a notice of controversion, or what computations were made by the deputy commissioner with respect to penalties and interest. We accordingly express no view about Hastings' entitlement to these additional amounts. The Board upon remand may be able to clarify the record in these respects and thereby issue a ruling that is susceptible to our review.

APPENDIX B

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

ROBERT HASTINGS Claimant-Petitioner v. EARTH-SATELLITE CORP. and CONTINENTAL CASUALTY CO. Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	BRB No. 77-598B
ROBERT HASTINGS Claimant v. EARTH-SATELLITE CORP. and CONTINENTAL CASUALTY CO. Employer/Carrier-Respondents	)	BRB No. 77-598A DECISION

DIRECTOR, OFFICE OF WORKERS' COMNPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)
)
Petitioner)

Appeals from the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Tersh Boasberg (Boasberg, Hewes, Finkelstein & Klores), Washington, D.C., for the claimant.

William J. Donnelly, Jr. (Galiher, Clarke, Martel & Donnelly), Washington D.C. for the employer/carrier.

Mary A. Sheehan (Carin Ann Clauses, Solicitor of Labor, Laurie M. Streetcar, Associate Solicitor), Washington, D.C., for the Director, Office Workermens' Compensation Program, United States Department of Labor.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

These are appeals by the claimant and the Director, Office of Workers' Compensation Programs (hereinafter referred to as the Director), from a Decision and Order (76-DCWC-176) of Administrative law judge Robert S. Amery pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (hereinafter referred to as the Act).

On April 1, 1971 the claimant suffered a stroke. For about eighteen months prior to the stroke he had been

working as an executive for the employer, a recently formed corporation of which he was an officer and a major shareholder. The claimant had worked for long hours under great pressure, performing a number of duties which were unlike those for which he had been responsible during his previous employment for fifteen years with the C.I.A. During the months immediatley preceding the stroke the claimant was under additional stress as he was dealing with the corporation's faltering financial situation.

After a period of temporary total disability the claimant returned to work for the employer on February 8, 1972. As the residual effects of the stroke caused him to become fatigued easily and adversely affected his ability to express himself and to assimilate information, the claimant was unable to perform his previous executive duties. He began working part-time, sitting at a desk reviewing proposals. He was paid for his part-time work on a prorated basis based on his previous full-time salary of $30,000 per year.

On March 14, 1974 the claimant was hospitalized for phlebitis in his right leg and pulmontary emboli. His treating physician, Dr. Hughes, advised him not to return to work thereafter.

The issues presented to the administrative law judge were whether the injuries arose out of and in the course of the claimant's employment; the nature and extent of the claimant's disability; the applicability of Section 8(f) of the Act, 33 U.S.C. §908(f); and whether the claim for the April 1, 1971 stroke was barred by the statute of limitations of Section 13 of the Act, 33 U.S.C. §913.

The administrative law judge resolved in favor of the claimant the doubts arising from the conflicting medical

opinions concerning the causes, nature and extent of the claimant's disability. Based primarily on the testimony of Dr. Hughes, the administrative law judge concluded that the claimant's 1971 stroke and 1974 phlebitis and pulmonary emboli were caused or aggravated by the conditions of his employment and the effect of those conditions upon him. The claimant was awarded compensation for temporary total disability for the period of April 1, 1971 to February 7, 1972 and for permanent partial disability for the period of February 8, 1972 until March 13, 1974. Those awards were subject to the maximum of $70 per week in effect after the time of the stroke. Beginning March 14, 1974, the claimant was awarded compensation for permanent total disability based on his wages at the time of the second injury as evidenced by a wage statement provided by the claimant. (Cl. Ex. 4).

Finding that the claimant's permanent total disability was not due solely to the March 14, 1974 injury but to a combination of that injury with the permanent partial disability resulting from the April 1, 1971 stroke which was manifest to the employer, the administrative law judge held Section 8(f) of the Act applicable to limit the employer's liability to payment of compensation for the permanent total disability for 104 weeks in addition to payment of all medical expenses arising from the injuries.

Section 13 of the Act was found not to bar the claim for the 1971 stroke and that finding is not appealed here.

The claimant appeals, contending that the administrative law judge erred in basing the award of permanent total disability on the claimant's part-time record for the year preceding the March 14, 1974 injury instead of basing the award on the claimant's earning capacity of $30,000 per year prior to the 1971 injury. The Director appeals contending that the administrative law judge erred in

applying Section 8(f) because the administrative law judge's own findings of fact indicate that the claimant's second injury was a consequential injury to the first injury for which the employer remains fully liable. In the alternative the Director argues that the administrative law judge erred in terminating the claimant's benefits for the permanent partial disability upon the occurrence of the second injury rather than ordering those benefits to be paid concurrently with the award for permanent total disability.

We turn first to the Director's appeal. The Director sets out the findings of the administrative law judge as follows:

> (1) As a result of the tension and stress in his employment claimant suffered a stroke in 1971.
>
> (2) Upon his return to his employment claimant suffered residual effects of the stroke which caused him to be weak, lethargic and very easily fatigued.
>
> (3) As a result of his physical fatigue and lack of energy claimant remained sitting at his desk during the three-four hours per day he was at his office.
>
> (4) Claimant's prolonged periods of sitting at immobility at work caused the onset of phlebitis in his right leg and resulted in pulmonary embolism.

The Director argues that because these findings establish a chain of causal relation that can only lead to the conclusion that the claimant's phlebitis and emboli were a direct result of and flowed naturally from the employment related stroke, the phlebitis and emboli constitute a "con-

sequential" rather than a "severable and independent" injury. As cases decided under the Act have held that such injuries are compensable, the Director contends that Section 8(f) is not applicable to limit the employer's liability. The Board finds that this argument of the Director is without merit. The cases cited by the Director in support of the contention that Section 8(f) is not applicable involved second injuries that were held compensable by virtue of their relation to compensable injuries, even though the second injuries occurred in such circumstances that they otherwise would have been noncompensable. *See Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459 (1968); *Andras v. Donovan,* 414 F.2d 241 (5th Cir. 1969); *Steele v. Adler,* 269 F.Supp. 376 (D.D.C. 1967); *Cyr v. Crescent Wharf & Warehouse Co.,* 211 F.2d 454 (9th Cir. 1954); *Travelers Insurance Company v. McLellan,* 302 F.Supp. 351 (E.D.N.Y. 169). In this case, the administrative law judge found that the claimant's phlebitis and pulmonary emboli were caused or aggravated by the sedentary desk position he occupied in the course of his employment. We do not find relevant to this issue the Director's argument that because of their connection with the 1971 stroke the results of the phlebitis and pulmonary emboli may have been compensable had they been due to the claimant's immobility while convalescing in the hospital or at home. In fact, as the Director notes in footnote 3 of the brief, the disease arose as a result of the immobility at work. We find it significant that even if the claimant's 1971 stroke had *not* been compensable, the disability arising after the phlebitis and pulmonary emboli clearly would have been compensable.

This case presents the very type of situation to which Section 8(f) has been held applicable. The employer rehired the claimant with knowledge of his disability. The claimant's disabled condition presented a risk of the

employer becoming liable for greater work-related disability than if it had hired a healthy person. The claimant's sitting at work, not immobility at home or in a hospital, caused or aggravated his condition, rendering him permamently totally disabled. Section 8(f) is applicable to limit the employer's liability in this situation. *See Lawson v. Suwanne Fruit & Steamship Co.*, 336 U.S. 198 (1949); *C & P Telephone Co. v. Director, Office of Workers' Comnpensation Programs*, 546 F.2d 503 (D.C. Cir. 1977), *rev'g. Glover v. C & P Telephone Co.*, 4 BRBS 223, BRB No. 75-300 (May 27, 1976); *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977), *rev'g. Hardy v. Equitable Equipment Co., Inc.*, 3 BRBS 426, BRB No. 75-265 (April 20, 1976); *Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs*, 542 F.2d 602 (3d Cir. 1976), *rev'g Aleksiejczyc v. Atlantic & Gulf Stevedores, Inc.*, 1 BRBS 541, BRB No. 74-202 (June 16, 1975). *See also Mellroy v. Jacksonville Shipyards, Inc.*, 8 BRBS 283, BRB No. 77-519 (April 28, 1978); *McKinney v. Rowe Machine Works, Inc.*, 2 BRBS 329, BRB No. 75-149 (Oct. 7, 1975).

The Director argues in the alternative that the employer's liability for payment of benefits for the claimant's permanent partial disability which the administrative law judge found arose out of the 1971 stroke should not have been terminated on the date the award for permanent total disability began and that the liability for those payments should continue until $24,000, the maximum in effect at the time of the stroke, was paid. The employer responds, contending that Section 8(f) applies to limit its liability for the claimant's entire disability and if any concurrent payments for the permanent partial disability are necessary, those payments should be paid from the special fund. We agree with the Director and reject the argument of the employer. Nothing in the Act in-

dicates that payments on an award for permanent partial disability should terminate when a later injury occurs rendering the claimant permanently totally disabled. The claimant's average weekly wages at the time of the second injury, upon which the award of permanent total disability is based under Section 10 of the Act, 33 U.S.C. §910, presumably already reflect a reduced earning capacity resulting from the previous injury. The award for the permanment partial disability should not have terminated even though the claimant was later permanently totally disabled.

The special fund is at no time liable for payment of benefits for the permanent partial disability resulting from the 1971 stroke. As we noted in *Hart v. Berg Shipyards, Inc.*, 8 BRBS 146, BRB No. 77-438 (March 31, 1978):

> . . . when the claimant's initial permanent partial disability is itself compensable under the Act, Section 8(f) does not limit the employer's liability for payment of compensation for that permanent partial disability . . . the purpose of Section 8(f) is to remove discrimination against handicapped workers that is otherwise encouraged by the Act. [Citations omitted]. Limiting the employer's liability for a compensable injury that results in the worker's handicapped condition does not serve that purpose.

8 BRBS at 151-152.

The claimant appeals contending that the administrative law judge erred in basing the award of permanent total disability on the claimant's part-time earnings during the year prior to second injury instead of on the claimant's earning capacity of $30,000 per year at the time of the 1971 stroke. The claimant contends that as a result of the

erroneous basis of computation of benefits, he is receiving less for the permanent total disability than he should for permanent total disability.

We find that the claimant's contentions are without merit. Under Section 10 of the Act:

> . . . the average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation . . . (Emphasis added)

At the time the claimant was injured in 1974, resulting in permanent total disability, his average yearly wage, upon which the computation of his average weekly wage is to be based under Section 10(d), 33 U.S.C. §910(d), was not $30,000 but $9,228.80 as evidenced by the earnings record submitted by the claimant. At no time after 1971 did the claimant have an earning capacity of $30,000 per year. The most the claimant could have received for the 1971 injury, regardless of the extent of disability resulting from that injury, was $70 per week as that was the maximum allowable under the Act at that time. The $70 per week for the permanent partial disability from the 1971 stroke, which we previously found in this decision to be owing on a continuing basis from the employer, together with the award for permanent total disability based on the claimant's average weekly wage at the time of the second injury provide the claimant with maximum allowable benefits under the Act.

Accordingly, the Decision and Order of the administrative law judge is modified to provide that the employer shall pay to the claimant compensation for permanent partial disability at the rate of $70 per week from February 8, 1972 until the maximum of $24,000 has been

paid. The remainder of the Decision and Order is affirmed.

Dated this 30th day
of June, 1978

APPENDIX C

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
ROBERT HASTINGS	:	
Claimant	:	
v.	:	Case No. 76-DCWC-176
EARTH SATELLITE CORP.	:	OWCP No. 40-88142
Employer	:	
and	:	
CONTINENTAL CASUALTY CO.	:	
Carrier	:	

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Washington, D.C. 20036

For the Employer/Carrier (Respondents)

Before: ROBERT S. AMERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation under provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. 901 *et seq.* (LHCA), as made applicable to the District of Columbia by the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq* (DCWCA), and the regulations implementing the LHCA, 20 C.F.R. 701 and 702. The claim was heard by me on October 12 and 13, 1976 at Washington, D.C. The main issues in the case involved whether the claimant's injuries arose out of and occurred in the course of his employment, the nature and extent of the injuries, the applicability of Section 8(f) of the LHCA, and whether the statute of limitations has barred the claim for the claimant's injury of April 1, 1971.

Two separate claim forms (Forms LS-203) were admitted in evidence in this case. In the first, dated 6/14/76, the claimant alleged he had suffered a stroke or thrombosis of the left middle cerebral artery and of the internal carotid artery on April 1, 1971. In the second, dated 3/6/75 the claimant alleged he suffered an injury described as phlebitis and pulmonary emboli on March 14, 1974. The respondent's counsel stated at the hearing he was prepared to proceed on both the 1971 and 1974 claims and the medical issues on both.

The parties stipulated to several matters and I find these to be established. They agreed that there was an employer-employee relationshiup betwene the parties on March 14, 1974, that the partis are subject to the LHCA and the DCWCA in this case, that the claimant's average weekly wage on April 1, 1971 was $576.92, and that the claimant was temporarily totally disabled following his stroke on April 1, 1971 until February 1972.

J. Robert Porter, President and Chairman of the Board of the respondent employer, testified to the effect that during the time of the claimant's injuries the firm was located in Washington, D.C. The firm, a consulting company, interpreted satellite and aerial photography and was involved with a variety of technically oriented consulting services for governments (federal, state, municipal and foreign), as well as for commercial operations, both domestic and foreign. The corporation was formed in September 1969 by Mr. Porter. The claimant, who was then in his mid 40's, was one of the first employees to join it soon thereafter. Both men had previously been with the Central Intelligence Agency and Mr. Porter had worked for NASA after that. The claimant had been one of the best analysts in the CIA and the chief of a section of about 50 people there.

The claimant's duties as an employee of the respondent employer consisted of being a quality control man and the corporation's secretary, treasurer and comptroller. He was essentially vice president for operations and held that third highest position in the company. The corporation allowed its key employees to purchase its stock and the claimant bought stock worth $20,000 outright and another $30,000 which was secured by all his assets (including his home) payable over a 5 year period. During the 18 months after he joined the corporation the claimant was under enormous pressure. He averaged about 60 hours of work per week dealing with personnel matters, marketing proposals, raising money and taking care of finances. The first 12-15 months the corporation was in existence its officers concentrated on getting proposals out, but after that financial matters became more critical and this was the claimant's responsibility – to prepare projections, review and edit bids and proposals, prepare materials for the

board, attend the board meetings and prepare financial materials for any group that might invest in the corporation. Most of this work had deadlies and there was considerable pressure on the claimant to meet those deadlines. He not only worked long hours for the company during the day time, he also discussed business with Mr. Porter from one to two hours by phone every night and during practically every weekend. The claimant had to learn parts of his duties while performing them. For example, the financial work was all new to him and there was a big change from being a Government employee for the CIA to an entrepreneur in a newly formed private corporation. Mr. Porter said the claimant put out "tremendous energy" and quickly grasped the many subjects involved in his new job.

Just prior to April 1, 1971 the corporation needed capital and the claimant was trying to get a financial package together. It was a time for very high stress. On several occasions during this period the claimant told Mr. Porter about a numbness or a tingling in the fingers of his left hand and he said his doctor could not diagnose it. On March 31, 1971 the claimant mentioned that he was seeing luminescent dots that floated in front of his eyes. Mr. Porter offered to drive him home from work, but the claimant declined. He seemed tired and hot and he had been working hard. The next day the claimant's wife called Mr. Porter and said her husband had had a stroke. No claim or report of the claimant's illness was made to the Deputy Commissioner until June 14, 1976. The Employer's First Report of Injury is dated April 22, 1976. The claimant's pay stopped when he stopped working, except for accrued leave and sick leave.

The claimant was unable to return to work until February 8, 1972, about 10 months after his stroke. When he return-

ed, he was only able to work part time; he was not given the high pressure activities with short deadlines and he was put on reviewing proposals. He was having some difficulty with his speech and the ability to get the right words out and this bothered him. He was unable to assimilate as much information as he had before the stroke. Although he was being paid at the same rate at which he had previously earned $30,000 a year, he was not working full time and he was paid on a pro-rated basis for the time he worked. He was not contributing as much to the firm. When at work he stayed at his desk and read and wrote. Finally, on March 14, 1974, he had a pulmonary embolism. Thereafter, he was taken off the firm's payroll. Mr. Porter said he would not rehire the claimant because the latter's judgment and effectiveness had declined.

The claimant testified to the effect that he had a degree from Princeton University, he had worked for the State Department for several years, for Pan American World Airways for one year, for the CIA for 15 years and he joined the respondent employer in 1969. He was 53 years old at the time of the hearing. He will be entitled to a CIA Government pension when he is 62 years old.

He invested about 50% of his assets in stock of the respondent corporation. Beteen 1969-1971 he was under pressure in his job, trying to round up business for the firm and learning the financial aspects of his job. He remembered seeing luminescent dots just prior to his stroke, but he had forgotten about the paralysis of his hand. He has not smoked since the stroke.

The claimant said when he returned to work in 1972 after recovering from his stroke he had a tendency to become confused at times and he became fatigued easily. He started working 2 hours a day 2 days a week and gradually increased this until he was working about half time 5 days

a week at the time of his phlebitis attack. About March 7, 1974 he first felt shortness of breath. On March 8, he went to see Dr. Hughes for more shortness of breath and he was eventully hospitalized by the doctor on March 14, 1974. He could not associate the pain in his calf which Dr. Hughes found with any particular incident or trauma.

According to the claimant, at the time of the hearing he was still getting confused and he had difficulty in finding the right words. He felt extremely tired and sometimes slept from 12-15 hours a day. He did not think he could find a job. After the phlebitis attack in March 1974 Dr. Hughes told him not to go back to work. He is under medical programs for his coagulation, for hypertension and for hematocrit and phlebotomy. He is married, but his wife is 64 and she is not employed. For the last 2 years they have existed on savings.

The claimant had decided there might be some relationship between his stroke and his employment and he discussed this with Mr. Porter prior to returning to work in 1972. The respondent employer has paid for the claimant's hospitalizations.

Dr. John J. Hughes, an internist, testified that he first treated the claimant in 1964 for a complaint of feeling tired and the doctor diagnosed his condition at that time as being labile hypertension without cardiovascular disease. He had a history of possible polycythemia, but his blood count was normal. Dr. Hughes also noted as a diagnosis: "excess cigarettes, too much coffee, too much tension, overworked." Labile means fluctuating, not a stable condition, and hypertension means high blood pressure. Polycythemnia is an excess of red blood cells in the body; the blood is thicker. The claimant did not have polycythemia when he first saw Dr. Hughes in 1964 and Dr. Hughes did not think he had had it previously, either.

This disease is determined by measuring the hematocrit, which is a measure of the percentage of the blood that is solid and that which is liquid. Another method is measuring hemoglobin in a specific amount of blood, but this is seldom used today because hematocrits are more accurate. The normal range of hematocrit for a male would be about 43 or 44 to 49 or 50, the normal hemoglobin about 14 1/2 to 15 1/2.

Dr. Hughes saw the claimant from time to time after that on annual physical exams and for occasional colds, flu, until July 1967 when the doctor diagnosed possible stress polycythemia in the claimant. This is a condition in which the red blood cells increase, but the white blood cells and the platelets do not. This differentiates it from "polycythemia vera," or true polycythemia, in which all the blood elements increase proportionaely. The risk in stress polycythemia is that if the blood becomes thick enough a thrombosis or clot may form inside a blood vessel. Dr. Hughes advised the claimant to exercise more, smoke less and lose some weight.

Dr. Hughes saw the claimant again in October 1969, when he had just started working for the respondent employer. His hematocrit had risen to 54 and his hemoglobin was 18.4, but he still had normal white blood count and platelets, so the doctor decided it was stress polycythemia. The claimant's blood pressure was a little elevated and the doctor thought he was under a lot of tension. Dr. Hughes' diagnosis was again labile hypertension, stress polycythemia, excess cigarettes, chronic tension, too flabby.

On April 1, 1971, when the claimant had his stroke, Dr. Hughes was out of town and one of the doctor's partners, Dr. Duvall, saw him. Dr. Duvall was an internist and hematologist and a specialist in oncology, the treatment of

malignancies with drugs. Dr. Duvall had the claimant admitted to the hospital April 19, 1971. The claimant had developed dysphasia (numbness of the right side of his body). He had a weakness of his right facial muscles and a psittacosis, i.e. he could not move his hands very well. He also had expressive aphasia, meaning he could think of the words he wanted to say, but he had trouble saying them. A brain scan showed a thrombosis of the left middle cerebral artery. Upon his admission to the hospital an arteriogram showed complete occlusion of the left internal carotid artery starting at the bifurcation and collateral circulation well established. The discharge diagnosis was left middle cerebral thrombosis and thrombosis of the internal carotid artery on the left. This is commonly referred to as a stroke. The angiographic diagnosis, based on x-ray films, showed occlusion. He was discharged April 21, 1971.

Dr. Howard M. Silby, a board certified neurologist, also saw the claimant during his hospitalization and his impression was "Left carotid occlusion with resultant left parietal lobe infarction, recovering." Dr. Silby thought the occlusion was secondary to the claimant's heavy smoking and mild hypertension.

In Dr. Hughes' opinion, stress and tension can lead to the increase or development of stress polycythemia. The doctor explained that this claimant had none of the other things that cause an increase in red blood cells. He did not have lung disease, emphysema, gross obesity, or any other known cause. Dr. Hughes said that the only rational basis he had to explain this polycythemia was stress, by which he meant both psychic and physical stress. This is consistent with a high hematocrit, which can cause changes in the coagulability of the blood and increase the likelihood of clotting. In Dr. Hughes' opinion there is a reasonable possibility that the claimant's stroke in April 1971 could

have been caused by or arose out of the stree, pressures and tensions of his employment with the respondent employer. The doctor explained further that the claimant did not have demonstrable polycythemia until he went to work for the respondent employer. It was after that that he developed the stroke and the thickening of his blood. While there may have been other factors, such as the claimant's smoking (although he never had enlargment of the heart or any evidence of vascular disease), Dr. Hughes thought the crucial factor was that his blood thickened and that antedated the episode. Patients with hematocrits over 50 are bled periodically to try to stay ahead of the bone marrow. The drawing of blood is called phlebotomy.

Dr. Hughest saw the claimant again in May and June 1974 and every 6 weeks thereafter. The claimant had halting or slurring speech and his right hand was troubling him. He complained of not being able to think critically and creatively or to make judgments and he needed to do this for his job. In Dr. Hughes' opinion, during the 10 month period from April 1971 until he went back to work in February 1972, the claimant was temporarily totally disabled and unable to function in his job as an executive. He went back to work February 8, 1972 and when Dr. Hughes saw him February 22, 1972 he was lethargic and having trouble with words and with mentation. For the next 3 years Dr. Hughes saw him for annual physicals and at 6-8 week intervals to check his blood pressure and blood count. He had a number of phlebotomies during this period in which about a pint of blood (500 cc's) was taken each time. The phlebotomies were for coagulability and were dictated by the hematocrit. His blood was producing an overabundance of red cells, but his white count was normal – this was the condition of stress polycythemia described by Dr. Hughes.

In Dr. Hughes opinion the claimant was partially disabled when he went back to work from February 8, 1972 to March 14, 1974. He could only work part time; he was fatigued and lethargic, he was unable to make the words come out and unable to think of the rights words. The claimant said he did not have much energy and it was a real struggle to function, so when he got to his office "He would sit at his desk and stay put." Dr. Hughes had given the claimant 21 phlebotomies from April 1971 to March 1974. On March 6, 1974 Dr. Hughes saw the claimant for a blood pressure check, hematocrit and phlebotomy. His blood pressure was too low, so the doctor changed his medicine. The claimant telephoned Dr. Hughes on March 8, complaining of shortness of breath. When he came in at the doctor's request for an examination there were changes in his electrocardiogram compatible with pulmonary embolus. He was dizzy, apprehensive and hyperventilating (breathing deeply and rapidly). On March 11, he was more dizzy and he had more shortness of breath. On March 14, Dr. Hughes discovered some tenderness in the claimant's right calf. Dr. Hughes then made a clinical diagnosis of probable pulmonary embolus and admitted him to the hospital that day. The doctor also found phlebitis, which is an inflammatory condition of the veins. This inflammation of the veins often causes clots to form in the vein. These clots break loose and float through the circulatory system until they get to a place they cannot get through – usually the lungs. They come up into the heart which pumps them out into the lungs and they plug a blood vessel in the lung. This is a pulmonary embolus. Emboli is plural. the claimant had a shower of them on both sides. The doctor said in his opinion the clots that caused the claimant's pulmonary emboli came from his phlebitis.

In the hospital the claimant was in the intensive care unit. He almost died. He was in shock for awhile. Blood gas

studies showed extremely poor profusion of blood going through the lung and exchange of oxygen. He was treated with blood thinner, anticoagulants, and he was supplied with oxygen. He was discharged from the hospital March 30, 1974. While in the hospital 40% of his lung was knocked out. He also had a transient paralysis of the right side of his body and there was a little of that remaining by discharge.

The pulmonary emboli condition was the direct sequel of the phlebitis. In Dr. Hughes' opinion the clotting was caused by the claimant sitting for prolonged periods. This allowed his blood to pool or sledge in the lower extremities, making a tendency to clot. The claimant had been working in his office sitting for 3 or 4 hours at a time and this was the only thing Dr. Hughes could blame his phlebitis on, because at the time he was not polycythemic. The doctor was taking blood and checking his hematocrit every 4-6 weeks. Dr. Hughes thought there was a reasonable possibility that the claimant's phlebitis and clotting resulted in a pulmonary embolus and that these were caused or aggravated by the sedentary desk position the claimant occupied in the course of his employment for the respondent employer. Dr. Hughes thought there was not a realistic possibility that the claimant's phlebitis and clotting could have been caused by a twisting of the leg, because in order to have phlebitis as a result of an injury or trauma, there has to be inflammation, some swelling, some hematoma, some bleeding and some damage. The claimant did not have any of these and the doctor had been watching for such things.

Dr. Hughes said the claimant has recovered from the lung clotting. The doctor is still seeing him periodically, checking his blood, occasionally doing a phlebotomy if his hematocrit is 50 or over, and checking his blood pressure.

The claimant has residual disability from his 1971 stroke in the form of slight expressive aphasia, and being tired, which is probably the result of his neurological deficit. Also, he is not as mentally acute as he was before the stroke. He is taking Diupres 250 for blood pressure and Diuril. He has been taking Coumadin, a blood thinner, since his pulmonary embolus and will probably stay on that permanently. He had his 35th phlebotomy since his stroke recently. He is under a risk for additional phlebitis and pulmonary embolus as he sits for prolonged periods. Dr. Hughes told the claimant not to go back to work. He didn't want the claimant to go back to a sedentary job because of the risk of phlebitis and he had great doubts whether the claimant could do the job now because of the residuals of the stroke. In Dr. Hughes' opinion the claimant is permanently and totally disabled for the type of executive work he had done before. The doctor thought the claimant's condition of permanent total disability was the result of the combination of both the 1971 stroke and the pulmonary emboli and phlebitis in 1974 and that he could not or should not work.

On cross-examination, Dr. Hughes stated that he estimated the claimant's medical impairment after his 1971 stroke to be 40% or 50%. Hypotension, low blood pressure, a condition the claimant once had early in March 1974, cannot cause phlebitis. Hypertension couldn't cause it, either. Dr. Hughes though the claimant's medical impairment after the phlebitis to be the same — about 40%-50%. He did not think the claimant should do any work and that he is not capable of working full time. However, the doctor said he might be able to deliver packages in his neighborhood because walking is good for his legs, although the doctor did not know whether such jobs were available, especially on a part time basis. There was no stress factor from polycythemia in March 1974 and

the claimant was not polycythemic at that time. Dr. Hughes repeated that he did not know what caused the claimant's phlebitis, but the only cause he knew of was his prolonged sitting at work. After the pulmonary emboli the claimant had an increased risk factor for the possibility of having future blood clots. The doctor has been keeping the claimant's prothrombin time about 25% of normal, which means his blood is less clottable than that of most people.

Dr. Bernard J. Walsh, an internist and cardiologist, examined the claimant on March 9, 1976, took his history and reviewed his medical reports. Dr. Walsh found no evidence that the claimant had any residual disability or problems relating to the pulmonary embolism and phlebitis incident of 1974. In Dr. Walsh's opinion the cause of the claimant's stroke of April 1, 1971 was atherosclerotic occlusions of a major cerebral artery. An angiogram showed the claimant had a marked degree of ahterosclerotic narrowing of his left carotid artery. Hypertension tends to promote thrombotic strokes which usually occur when there is a gradual narrrowing of the lumen of a major cerebral artery. Dr. Walsh did not think that polycythemnia had anything to do with the claimant's stroke, and he did not think that the claimant's hematocrit levels were unsually high. He said the blockage of the left carotid artery was due to arteriosclerotic disease of that artery. One possible factor that would have a bearing on cerebral arteriosclerosis in this case is labile hypertension.

Dr. Walsh did not think that the claimant's phlebitis of March 1974 could be attributable to sitting down at work. He said phlebitis occurs when something causes a vein to become inflamed, then the bloodsteam slows and a blockage or clot forms. Hemorrhagic thrombus occurs when a piece of clot breaks off and free floating clots in the vein ultimately drain into the lung and become a

pulmonary embolus. People who sit in one position for hours without moving would have stagnation and venous insufficiency because they haven't used their legs to massage the blood back into circulation, but except in a very rare case, no one would get phlebitis under those circumstances, according to Dr. Walsh. The doctor would not advise the claimant to stay off work and could see no reason why he hadn't returned to work as he had done from February 1972 to March 1974. The fact that the claimant is on Coumadin to prevent further thrombosis would not prevent him from going back to work. The principle or theory that stress is a factor in the production of cardiovascular narrowing of blood vessels is not accepted among cardiovascular specialists, according to Dr. Walsh and he did not agree with it. The doctor thought that he would probably not put the claimant on Coumadin for his phlebitis if he were treating him; he would put him on aspirin, which is also an anticoagulant.

A report of Dr. Oscar B. Hunter dated June 9, 1962 showing the claimant then had a corrected hematocrit of 53% was admitted in evidence.

The deposition of Dr. Jack J. Rheingold is admitted in evidence as Respondents' Exhibit 6. Dr. Rheingold, an internist and hematologist, had examined some of the claimant's medical records and his history. Dr. Rheingold did not think there was a causal relationship between the claimant's stressful employment and his stroke in 1971. He thought it was much more likely that the occlusion occurred as a result of vascular disease that included arteriosclerosis and hypertension. The doctor said that the term "stress polycythemia" should be called "spurious" or "false polycythemnia" and, although people with this condition do have more thrombotic episodes, the consensus is that these are not due to stress. He knew of no way stress

of its effect upon the cardiovascular system could be measured. The doctor could not tell whether the claimant had polycythemia.

Dr. Rheingold did not see any probable relationship between the claimant's phlebitis in 1974 and his job. He did not think that people ordinarily sat still for very long when working at a desk job and thought it was unlikely that this would produce thrombosis. The doctor was aware of a body of medical opinion which held that stress or spurious polycythemia can be ascribed to stress factors such as emotional stress, in fact he, himself, was taught that when in training. However, he believed that today this is not the majority view. He did not agree that stress polycythemia has a relationship to stress factors. He did agree, however, that there is reasonable medical opinion that stress and tension can contribute to hypertension. It is a common cause of labile hypertension, he said.

In a report of Dr. Rheingold dated June 20, 1962 the doctor had stated he thought the claimant did not have polycythemia at that time, despite the fact that he had a hemoglobin of 16.1 gms, a hematocrit of 53 and an elevated white count. A wage statement showing the hours and dates the claimant worked from February 1972 to March 1974 has been received and is admitted in evidence as Claimant's Exhibit 4.

In resolving the issues of causal relationship between the claimant's injuries[1] and his employment, as well as the nature and extent of his disabilities, I am mindful of the presumption of coverage, Section 20(a) of the LHCA, as well as the principles that the LHCA and DCWCA are to

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[1]His stroke and the phlebitis and pulmonary emboli are "injuries" within the meaning of Section 2(2), LHCA.

be liberally construed and all doubts are to be resolved in favor of the claimant. Friend v. Britton, 220 F.2d 820 (D.C. Cir. 1955) cert. den. 350 U.S. 836; Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1965); Howell v. Einbinder, 350 F.2d 442 (D.C. Cir. 1965); Vinson v. Einbinder, 307 F.2d 387 (D.C. Cir. 1962) cert. den. *sub. nom.* Aetna Casualty & Insurance Co. v. Vinson, 372 U.S. 934 (1963).

Using these criteria, in my opinion, the testimony of the claimant and that of Dr. Hughes, together with other corroborating evidence and stipulations in the case, are sufficient to support a finding that the claimant's stroke on April 1, 1971 and his phlebitis and pulmonary emboli on March 14, 1974 were caused or aggravated by the conditions of his employment and the effect of those conditions upon him. According to Dr. Hughes, the stress, pressures and tensions of the claimant's job caused him to have stress polycythemia which brought about an increase in red blood cells or thickening of his blood and the resulting stroke that occurred in April 1971. Also, the claimaint's subsequent sitting still at his desk at work for prolonged periods was the only factor the doctor knew of that could have caused the claimant's phlebitis and consequential pulmonary emboli in March 1974. White there is other medical evidence to the contrary in the case, including the testimony of Drs. Walsh and Rheingold, as previously noted, I am required to follow legal precedents in resolving all factual and other doubts in favor of the employee in order to accomplish the liberal construction and beneficent purposes of the LHCA. In addition, Dr. Hughes was the treating physician and he had been examining and treating the claimant extensively since 1964 and for that reason I have accorded greater weight to his testimony. I conclude that the claimant's injuries of April 1, 1971 and

March 14, 1974 arose out of and occurred in the course of his employment. cf. Vol. 1A, Larson, "The Law of Workmen's Compensation #42.21 p. 7-354 to 7-358 (1977); Weber v. General Dynamics Corp., 5 BRBS 112, BRB Nos. 76-129, 129A (1976); Urban Land Institute v. Garrell, 346 F.Supp. 699 (D.C. Cir. 1972); Wheatley v. Adler; Howell v. Einbinder, both *supra*.

In view of a stipulation of the parties and the evidence from Dr. Hughes, the claimant and others, I find that the claimant was temporarily totally disabled from April 1, 1971 to February 7, 1972. During this time, or portions thereof, he had dysphasia, weakness of his right facial muscles, psittacosis, expressive aphasia, fatigue and a reduction in mental acuity resulting from the stroke. For this, in accordance with Section 8(b) of the LHCA, he is entitled to 66 2/3% of his average weekly wage up to the maximum allowable at the time, which was $70. per week.

For the period February 8, 1972 until March 13, 1974, when his condition had stabilized sufficiently for him to go back to work part time, under provisions of Section 8(c)(21), LHCA, the claimant is entitled to permanent partial disability consisting of 66 2/3 of the difference between his average weekly wages before the injury and his wage earning capacity after the injury in the same employment or otherwise, however, this, too is limited by the maximum allowable at that time of $70. per week.[2]

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[2]It may be noted that I have found the claimant's disability to be permanent partial for that period rather than temporary partial as requested by the claimant's counsel. Since this not only includes all the claimant asked for and more, the claimant should not be heard to complain. The respondents' counsel, at the outset of the hearing, expressed his readiness to proceed on all medical issues pertaining to both claims and, in that portion of his brief in which he urged that Section 8(f) should apply, his argument was based upon the premise that Dr. Hughes had testified that the claimant was *permanently* par-

From March 14, 1974 to the present, there is evidence in the form of the testimony of the claimant and Dr. Hughes, to the effect that the claimant is permanently totally disabled and he should not work.[3] It is true that Dr. Hughes thought the claimant might be able to deliver packages in his neighborhood for 3 to 4 hours a day, but this is the only type of work the doctor thought he could do and there was no evidence that any such job was available. The burden is on the employer to show that there are actual employment opportunities available to the claimant. Perini Corp. v. Heyde, 306 F.Supp. 1321 (D. R.I. 1969); Nolan v. Ingalls Shipbuilding Corp., 2 BRBS 81, BRB NO. 75-129 (1975); American Stevedores v. Salzano, 538 F.2d 933 (2d Cir. 1976). In this case the employer has been unable to show such employment opportunities and, of course, the president of the corporation testified to the effect that he would not rehire the claimant. Here, the claimant's condition has continued for a fairly lengthy period and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. In these circumstances I conclude that the claimant is permanently totally disabled and has been so since March 14, 1974.

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tially disabled prior to this second injury. Under this circumstances, the case of Swan v. George Hyman Construction Co., 3 BRBS 490, BRB Nos. 75-203 and 203A (1976), which held it to be error prejudicial to the employer for a finding of disability outside those raised in the pleadings, is distinguishable, in my opinion, and the respondents should not be heard to complain about lack of notification of this disability status issue. They have not, of course, made any such complaint.

[3]"Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Section 2(10), LHCA.

Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968) cert. den. 394 U.S. 976 (1969). Under provisions of Section 8(a), LHCA the claimant is entitled to 66 2/3% of his average weekly wage at the time of his (second) injury (the one that, combined with the first injury made him permanently totally disabled), subject to applicable administrative adjustments to be made by the Deputy Commissioner, under Section 10(f) of the LHCA. Probably the best way to determine the average weekly wage of a part time worker such as the claimant is to take one fifty-second part of his actual average annual wage of $9228.80 for the year prior to his injury of March 14, 1974 (from Claimant's Exhibit 4). Section 10(d), LHCA. This amounts to about $77.48 per week and 66 2/3% of that is $118.32.[4]

The claimant is also entitled to reimbursement or payment by the respondents of the reasonable costs of such necessary medical care and treatment as the nature of the claimant's injuries has required or may require. Section 7 of the LHCA.

The respondents urge that if the claimant is found to be permanently totally disabled, such a finding must be based largely upon the testimony of Dr. Hughes and since Dr. Hughes testified that in his opinion the claimant's permanent total disability was the result of the combination of the claimant's two injuries, that Section 8(f) should apply here so that the employer's liability should be limited and some benefits should be paid the claimant from the Special

[4]All computations herein are subject to verification by the Deputy Commissioner.

Fund described in Section 44 of the LHCA[5] I agree with their contention. Certainly the claimant had a previous disability as a result of his stroke in April 1971. Dr Hughe mentioned the claimant's partial disability thereafter; at one point he estimated it to be an impairment of 40% - 50% and it seems clear that the residuals of the stroke were permanment. The disability was both economically and physicall disabling. It was manifest to the employer and the claimant's permanent total disability was not due solely to the second injury in March 1941 but to a combination of the two injuries. Also, Section 8(f) should apply, not only in cases of initially hiring the handicapped, but in the continued employment and retention of the handicapped by the same employer, as well. Cooper v. Copper Associates, Inc., 5 BRBS 79 (ALJ), 76-DCWC-126 (1976); Keeler v. General Dynamics Corp., 5 BRBS 207 (ALJ), 76-LHCA-1051 (1977).

In addition, the employer gave the claimant special job consideration in part time work of a less stressful nature

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[5]Section 8(f) of the LHCA provides in part:

> "(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury . . . In all other cases of total permanent disability . . . found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide, in addition to compensation under paragraphs (b) and (e) of this section, compensation payments . . . for 104 weeks only . . . (2) after cessation of the payments for the period of weeks provided for herein, the employee . . . entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in Section 44."

without deadlines, because of his disability from the stroke, and this is a characteristic of Section8(f) cases. I conclude that Section 8(f) applies to this claim and the respondents shall pay benefits for permanent total disability for 104 weeks only. Section 8(f)(1) The remainder of compensation due shall be paid out of the Special Fund. In accordance with Section 8(f)(2) the annual statutory adjustments shall be paid by the respondents during their 104 weeks period of liability and all subsequent statutory adjustments shall be paid out of the Special Fund. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949); Dillingham Corp. v. Massey, 505 F.2d 1126 (9th Cir. 1974); American Mutual Insurance Co. of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970).

The respondents contend that the claim filed on June 14, 1976 for the April 1, 1971 injury should be barred by the statute of limitations under provisions of Section 13(a) of the LHCA. It is true that this claim was filed well over a year after the injury and that the claimant might or should have been aware of the relationship between the injury and his employment. However, I agree with the claimant's position that Section 30(f), LHCA, should apply here, since the respondents had actual notice or knowledge of the injury of the employee and failed or neglected to file a report thereof as required by Section 30(a) within 10 days — not until April 22, 1976. It is on that date that the Section 13 statute of limitations began to run, and, of course, the claim was filed long before that year was up. I conclude that the claim for the 1971 injury was not time barred. McKinney v. Rowe Machine Works, Inc., 2 BRBS 329, BRB Nos.75-149, 149A, 149B (1975); Silberstein v. Service Printing Co., Inc., 2 BRBS 143, BRB Nos. 75-144, 144A (1975).

A penalty of 10% is payable on all payments of compensa-

tion awarded herein which were not paid within 14 days after such became due, unless notice of controversion was filed within 14 days after the employer had knowledge of the injury or the payment was excused by the Deputy Commissioner. Section 14(e), LHCA: Ryan v. McKie Co., 1 BRBS 221, BRB No. 74-160 (1974). The calculation of the exact amount of the penalty to be added is remanded to the Deputy Commissioner for determination. Also, interest at the rate of 6% per annum shall be added to the amount of compensation, plus the 10% penalty which is found due herein, calculated from the date each payment was due until it is paid to the claimant. Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1225 (5th Cir. 1971) cert. den. 406 U.S. 958 (1972).

The claimant's counsel has submitted an application for attorneys' fees and other costs and this has been opposed by counsel for the respondents on the grounds that both the rate requested and the number of hours expended on the case are excessive. Pursuant to Section 28 of the LHCA and 20 C.F.R. 702.132 I conclude that $8,000. is a fair and reasonable fee for all the actual necessary attorney's services performed (by both Mr. Boasberg and Ms. Southwick) in this case. I also approve the following additional costs and fees: disbursements for transcripts and depositions amounting to $296.55 and witness fees of $300. for Dr. Hughes and $21. for Mr. Porter (who testified as a lay, not an expert witness in this case). No separate fee is allowable for Dr. Clark, who must seek payment from the claimant's counsel for the medical research he performed for him. The total approved is $8617.55.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The respondents shall pay to the claimant compensation for temporary total disability, under provisions of Section 8(b), LHCA, 33 U.S.C. 908(b), for the period April 1, 1971 to February 7, 1972, inclusive, at the rate of $70. per week.

2. The respondents shall pay to the claimant compensation for permanent partial disability, under provisions of Section 8(c)(21), LHCA, 33 U.S.C. 908(c)(21), for the period February 8, 1972 to March 13, 1974, inclusive, at the rate of $70. per week.

3. The respondents shall pay to the claimant compensation for permanent total disability under provisions of Section 8(a), LHCA, 33 U.S.C. 908(a), commencing March 14, 1974 at the rate of $118.32 per week, plus all prescribed annual adjustments, for 104 weeks. After that, the claimant's continuing benefits, with subsequent adjustments, shall be paid out of the Special Fund established by Section 44, LHCA, under provisions 8(f) LHCA.

4. In accordance with Section 7(a), LHCA, 33 U.S.C. §907(a), the respondents shall pay or reimburse the claimant for the reasonable costs of necessary medical care and treatment resulting from the claimant's injuries of April 1, 1971 and March 14, 1974.

5 . The respondents shall pay, in accordance with Section 14(e) LHCA, 33 U.S.C. 914(e), an additional 10% on all payments of compensation awarded herein which have not been paid when due.

6. The respondents shall pay interest on accrued unpaid benefits at the rate of 6% per annum computed from the date each payment was originally due until paid.

7. The respondents shall also pay directly to Tersh Boasberg, Esq. the sum of $8617.55 for necessary legal services, witness fees and costs rendered on behalf of the claimant in connection with this case.

/s/ Robert S. Amery
ROBERT S. AMERY
Administrative Law Judge

Dated: August 12, 1977
Washington, D.C.

APPENDIX D

Earth Satellite v. Robert Hastings Petition for cert

NATIONAL COUNCIL ON COMPENSATION INSURANCE

June 10, 1980

Richard W. Galiher, Jr., Esq.
Galiher, Clarke, Martell & Donnelly
1215 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Galiher:

Re: Robert Hastings v. Earth Satellite Corporation

This is in response to your request as to the potential impact on workers' compensation insurance rates by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Hastings* v. *Earth Satellite Corporation, et al.,* decided March 17, 1980.

As an introductory note, the National Council on Compensation Insurance, hereinafter referred to as the "Council", was organized in December 1922 and became operational on May 1, 1923 at which time it superseded the National Council on Workmen's Compensation Insurance. The Council is a voluntary non-profit unincorporated statistical and ratemaking organization in the workers' compensation field. It operates in the majority of the state jurisdictions on behalf of various insurance companies and other entities writing this form of coverage. Its membership includes stock companies, mutual companies, reciprocals and competitive state funds.

The Council collects statistics by state and from the statistics develops the manual rates that are filed in each state each year. When manual rates are calculated each year, they are filed by the Council on behalf of all its members and subscribers operating in the states involved. Before such filing is made, it is approved by the state Classification and Rating Committee composed of equal numbers of stock and non-stock carriers. The Council then appears in support of the filing at public hearings or meeting in the state, supporting the filing with appropriate testimony and exhibits.

Another important function of the Council is to evaluate the cost of benefits resulting from amendments in state and federal workers' compensation laws, and to incorporate the effect of such costs in the rating process. Law benefit changes impact immediately on loss costs inasmuch as carriers are required to pay benefits at the increased levels upon enactment of a law.

The procedures and methodology of the ratemaking process and the system of evaluating benefits are subject to and have been accepted by all jurisdictions in which the Council acts as the filing agent and by the National Association of Insurance Commissioners (NAIC).

Pursuant to your request, the National Council has priced the effect of a retroactive feature on the repeal of the $24,000 limit on permanent partial payments in the District of Columbia. In pricing the retroactive feature, we also encounter the question of which policies will be charged a one time surcharge based upon the policy premium immediately preceding the amendments.

Based upon the above assumptions, the Council estimates a 100% surcharge would have been applicable in the District of Columbia to cover the additional claims

costs had the repeal of the $24,000 maximum on permanent partials been made retroactive to claims which occurred prior to the effective date of the amendments and which had not yet reached the $24,000 maximum. In terms of dollars, this would have amounted to approximately $17 million for the District of Columbia.

Please feel free to contact us if you have any further questions.

Yours very truly,

Michael Camilleri
Assistant to General Counsel

Yours very truly,

Supreme Court, U.S.
FILED
AUG 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1988

In the Supreme Court of the United States

OCTOBER TERM, 1979

EARTH SATELLITE CORPORATION AND CONTINENTAL CASUALTY COMPANY, PETITIONERS

v.

ROBERT HASTINGS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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EARTH SATELLITE CORPORATION AND CONTINENTAL CASUALTY COMPANY, PETITIONERS

v.

ROBERT HASTINGS, ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the pre-1972 limit on aggregate compensation benefits for certain disabilities under former Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act applies to cases where that limit had not been reached at the time of its repeal.

2. Whether an injured worker's "average weekly wage" under Section 10 of the Longshoremen's and Harbor Workers' Compensation Act should be measured by the amount he earned during the period immediately preceding the injury, where the worker had demonstrated a progressive increase in earnings while recuperating from an earlier injury.

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*The Director of the Office of Workers' Compensation Programs of the Department of Labor is also a respondent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is not yet reported. The opinion of the Benefits Review Board (Pet. App. 28a-37a) is reported at 8 B.R.B.S. 519. The opinion of the administrative law judge (Pet. App. 38a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980. The petition for a writ of certiorari was filed on June 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Robert Hastings is permanently totally disabled as a result of injuries sustained in the course of his employment with petitioner Earth Satellite Corporation (Pet. App. 2a-3a, 4a n.3). On April 1, 1971, Hastings suffered an employment-related stroke (*id.* at 2a-3a). On February 8, 1972, following a ten-month convalescence, Hastings returned to work part-time at Earth Satellite. He was compensated at his former salary rate but his earnings were reduced in proportion to his diminished hours (*ibid.*). Hastings worked part-time for about two years until March 14, 1974, when employment-related pulmonary emboli rendered him unable to work (*id.* at 3a-4a).

Thereafter, Hastings filed compensation claims for the stroke and the emboli under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), as extended to employment in the District of Columbia by the District of Columbia Workmen's Compensation Act (D.C. Code Ann. §§ 36-501 and 36-502 (1973); Pet. App. 4a). A Department of Labor administrative law judge found that Hastings was temporarily totally disabled during the ten-month period

of convalescence following his stroke, permanently partially disabled during the two-year period of part-time employment, and permanently totally disabled after March 14, 1974 (*id.* at 5a-6a, 55a). For both the ten-month and the two-year periods of disability attributable to the stroke, the administrative law judge awarded Hastings benefits of $70.00 per week, the maximum rate of compensation prior to the 1972 Amendments to the Longshoremen's Act (*id.* at 5a-6a, 60a).[2] For the permanent total disability resulting from the emboli, Hastings was awarded two-thirds of his "average weekly wages" (*id.* at 6a, 56a).[3] Concluding that "[p]robably the best way to determine the average weekly wage of a part-time worker such as the claimant is to take one fifty-second part of his actual average annual wage of $9228.80 for the year prior to his injury of March 14, 1974 * * *" (*id.* at 56a), the administrative law judge fixed Hastings'

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[2]The Longshoremen's Act provides for compensation equivalent to two-thirds of lost earning capacity (Sections 8(a), 8(b), 8(c)(21) and 8(e), 33 U.S.C. 908(a), 908(b), 908(c)(21) and 908(e)), not to exceed a specified maximum rate (Section 6(b), 33 U.S.C. 906(b)). The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (Pub. L. No. 92-576, Section 5(a), 86 Stat. 1252-1253) raised the maximum rate of compensation by phasing in a formula based on a percentage of the "national average weekly wage." Under the adjustment scheme set out in amended Section 10(h) of the Act, 33 U.S.C. 910(h), Hastings' disability from the 1971 injury remains subject to the pre-1972 $70.00 per week limit. See *Landrum* v. *Air America, Inc.*, 534 F. 2d 67 (5th Cir. 1976).

[3]See note 2, *supra*. The Section 6(b) maximum rate then in effect was $261 per week. See *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 34 n.5 (1979). Hastings was entitled to the full two-thirds of average weekly wage provided for by Section 8(a) since that amount did not exceed this maximum rate.

permanent total disability benefits at $118.32 per week, commencing March 14, 1974 (*id.* at 6a-7a, 21a, 60a).[4]

On appeal, the Benefits Review Board modified the award, extending the benefits for permanent partial disability to run concurrently with the benefits for permanent total disability until they reached the $24,000 limit set by former Section 14(m) of the Act, 33 U.S.C. (1970 ed.) 914(m), which had been repealed by Section 5(e) of the LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1254. (Pet. App. 9a, 36a).

The court of appeals agreed that the permanent partial disability benefits should continue concurrently with the permanent total benefits (Pet. App. 13a-15a).[5] However, the court ruled that the claimant's benefits for the stroke-caused disability were not limited by the pre-1972 $24,000 ceiling. Applying this Court's guidelines in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), the court below ruled that "the repeal of section 14(m) applies retroactively to awards for preamendment injuries that had not reached the statutory ceiling before the effective date of the 1972 Amendments" (Pet. App. 20a). As for the computation of Hastings' average weekly wage at the time of his second injury, the court of appeals concluded that the administrative law judge's "mechanical application" of the Act's earning capacity formula failed to take into account the gradual increase in the number of hours Hastings had worked in the year preceding the injury (*id.* at 3a n.2, 21a-25a). The court therefore remanded for a

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[4]Under Section 8(f) of the Longshoremen's Act, 33 U.S.C. 908(f), Earth Satellite's liability was limited to the first 104 weeks of permanent total disability benefits; the balance would be paid from the "special fund" established by Section 44 of the Act, 33 U.S.C. 944 (Pet. App. 8a & n.11).

[5]This scheme of concurrent awards is not challenged here.

new calculation of average weekly wages, concluding that "where * * * an employee demonstrates a progressive increase (or decrease) in earnings in the year immediately preceding an injury, * * * a compensation award should be fixed by * * * examining most closely the earnings immediately preceding the injury" (*id.* at 25a).

ARGUMENT

1. In holding that disability claims pending at the time of Section 14(m)'s repeal should not be limited by that Section's $24,000 ceiling, the court of appeals correctly followed the principle, enunciated in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Accord, *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975).[6]

Although the express language of the 1972 LHWCA Amendments does not indicate whether the repeal of Section 14(m) applies to continuing disability cases, an affirmative answer is implicit in language Congress elected not to employ. As the court below noted (Pet. App. 16a-17a & n.15), unlike the 1972 modification all previous changes in Section 14(m)'s benefit levels were expressly limited in their application to deaths and injuries occurring after enactment. Act of June 24, 1948, ch. 623, Section 6, 62 Stat. 604; Act of July 26, 1956, ch. 735,

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[6]Petitioners incorrectly assert (Pet. 12-14) that the *Bradley* principle had not been established at the time the 1972 LHWCA Amendments were enacted. The *Bradley* court expressly rested its decision on an earlier decision (*Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969)) that settled the law on this point and "stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." 416 U.S. at 715.

Section 9, 70 Stat. 656; Act of July 14, 1961, Pub. L. No. 87-87, Section 4, 75 Stat. 204. Thus, "[t]he 1972 Congress, by its silence, deviated from the past practice of specifically providing for nonretroactivity" (Pet. App. 17a).

That this deviation was purposeful is borne out by the circumstances surrounding it. During hearings on the 1972 Amendments, a prominent industry spokesman urged both houses to adopt, as they had in the past, a provision limiting the amendments' reach to future injuries. See *Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 314 (1972); *Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 115, 131-132 (1972) (statements of E.D. Vickery). The 1972 Amendments as finally passed did contain an express limitation "to deaths or injuries occurring after the enactment of this Act" (Section 20(c)(3) of the Amendments, 86 Stat. 1265), but only with respect to a subsection (Section 20(c)) that eliminated the requirement that a widower prove dependency on his spouse in order to collect death benefits. The subsection repealing Section 14(m) (Section 5(e) of the Amendments, 86 Stat. 1254) does not contain a comparable limitation. This legislative history strongly suggests that Congress intentionally chose to treat the repeal of Section 14(m)'s $24,000 ceiling differently than it had treated prior changes and to make the repeal applicable to pending disability claims. In any event, there certainly is nothing in the language, structure or legislative history of the Amendments to imply, much less compel, a contrary conclusion.

Moreover, the court of appeals correctly concluded that applying the repeal of Section 14(m) to pending cases

would not work a manifest injustice. Looking to the factors set forth in *Bradley* (416 U.S. at 717)—the nature of the parties, the nature of the rights, and the nature of the impact of the change in law upon those rights—the court of appeals observed that the repeal of Section 14(m) constituted a change in remedy rather than a change in basic liability. The "artificial ceiling" of $24,000 had "in effect allowed the employer to avoid the responsibility for the full costs associated with his enterprise because it deprived his employees of compensation for earning capacity lost in the employer's service" (Pet. App. 19a). Thus, the amendment merely removed an "obstacle to fair treatment" (*id.* at 20a). Contrary to petitioners' contention (Pet. 20, 24), the amendment did not impair matured or vested rights since neither a claimant's right to benefits nor an employer's liability for them fully matures under the Longshoremen's Act until one year after the rejection of a claim or the last payment of compensation. Section 22 of the Act, 33 U.S.C. 922. See *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-465 (1968); *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

The conclusion that the decision below does not result in manifest injustice is reinforced by the fact that the courts of appeals have consistently applied other liberalizing provisions of the 1972 Amendments without regard to the date of injury. See, *e.g.*, *Matthews* v. *Walter*, 512 F. 2d 941, 946 (D.C. Cir. 1975) (transfer of liability for successful claimants' attorney's fees from claimants to employers); *Dillingham Corp.* v. *Massey*, 505 F. 2d 1126, 1129 (9th Cir. 1974) (same); *Overseas African Construction Corp.* v. *McMullen*, 500 F. 2d 1291, 1297-1298 (2d Cir. 1974) (same); *Cooper Stevedoring of Louisiana, Inc.* v. *Washington*, 556 F. 2d 268, 271-273 (5th Cir. 1977) (liberalized time-limitation provisions); *C & P Telephone Co.* v. *Director, OWCP*, 564 F. 2d 503, 510 (D.C. Cir.

1979) (expanded "second-injury" provision); *Todd Shipyards Corp.* v. *Witthuhn*, 596 F. 2d 899, 901-904 (9th Cir. 1979) (unrelated death benefits); *St. Louis Shipbuilding & Steel Co.* v. *Casteel*, 583 F. 2d 876, 877-878 (8th Cir. 1978) (same); *Nacirema Operating Co.* v. *Lynn*, 577 F. 2d 852 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979) (same); *State Insurance Fund* v. *Pesce*, 548 F. 2d 1112 (2d Cir. 1977) (same); *Norfolk, Baltimore & Carolina Lines, Inc.* v. *Director, OWCP*, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977) (same).[7]

2. The court of appeals' reversal of the administrative calculation of Hastings' "average weekly wage" preceding his second injury was justified under the facts of this case. While recognizing that earning capacity is a factual determination with respect to which the administrative law judge has broad discretion, the court below observed that that discretion must be exercised with flexibility so as to accomplish the statutory purpose. "Concededly," the court noted, "the ALJ and the Board calculated Hastings' benefits in accord with the literal terms of the statutory formula, [33 U.S.C.] 910(a), 910(d), and we are loath to

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[7]Petitioners' reliance (Pet. 24-32) on the Contract Clause of the Constitution (Article I, Section 10) is misplaced. First, the state court cases cited by petitioners are inapposite. They apply a "contract theory" to elective workers' compensation laws—an increasingly endangered species of laws under which employers may reject a compensation scheme in favor of a more traditional fault-based system. See generally 2A A. Larson, *The Law of Workmen's Compensation* § 67.10 n.62 (1976 & Cum. Supp. 1979). The Longshoremen's Act, like most extant compensation laws, creates a mandatory compensation system. Second, the Contract Clause by its own terms does not cover federal enactments. Of course, the Due Process Clause imposes similar requirements of basic fairness and reasonableness (see, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82-84 (1978); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976)), which are subsumed under the *Bradley* "manifest injustice" test.

criticize an administrative agency for that. The statute does not, however, elevate mechanical computation above common sense. An ALJ can, and should, adjust the average weekly wage calculation to award benefits that accurately reflect the claimant's true earning capacity. The existence of this kind of flexibility is apparent both from the statute itself, and decisions construing it. * * * [33 U.S.C. 910(c)] explicitly recognizes that the mechanical formula for benefit computation must be disregarded where the formula would distort a claimant's actual earning capacity" (Pet. App. 22a).

Nothing in the administrative law judge's one-sentence explanation of his computation suggests that he gave any thought to the pattern of Hastings' earnings following his stroke or took account of Hastings' steady increase in earnings in determining "such sum as * * * shall reasonably represent the annual earning capacity of the injured employee" at the time of the injury. Section 10(c) of the Act, 33 U.S.C. 910(c). As the court below concluded (Pet. App. 23a), Hasting's earning capacity or " 'potential to earn' at the time of his final collapse is not well measured by his earnings as much as 12 months earlier." Accordingly, the court of appeals remanded to the factfinder for a closer examination of Hastings' most recent earnings record. That step does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1980

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IN THE

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OCTOBER TERM, 1979

NO. 79-1988

EARTH SATELLITE CORPORATION

AND

CONTINENTAL CASUALTY COMPANY,

Petitioners

v.

ROBERT HASTINGS

AND

DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS

UNITED STATES DEPARTMENT OF LABOR,

Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Robert Hastings, the Respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of this Court and to file herein his response to the Petition for Writ of Certiorari to this Court filed by Petitioner in single counterpart, without printing the same. The typed brief of the Respondent in opposition is presented herewith.

The affidavit of Robert Hastings in support of this motion is filed herewith.

Dated July, 17, 1980

Respectfully Submitted,

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Counsel for Respondent
Robert Hastings

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1988

EARTH SATELLITE CORPORATION

AND

CONTINENTAL CASUALTY COMPANY,

Petitioners

v.

ROBERT HASTINGS

AND

DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS

UNITED STATES DEPARTMENT OF LABOR,

Respondents

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Robert Hastings, being duly sworn, on oath disposes and says:

1. He is the Respondent in the above-entitled action and makes this Affidavit in support of his motion for leave to proceed in forma pauperis herein.

2. He is 57 years old and is retired because of medical disability from his job as a corporate comptroller-treasurer.

3. The disability payments made by the Petitioners pursuant to the Order of Administrative Law Judge, U.S. Department of Labor, Case No. 76-DCWL-176, provides almost all of his income.

4. I has had a stroke, pulmonary embolisms, phlebitis, and is totally disabled.

5. Because of his poverty, Petitioner is unable to pay fees and to pay or give security for costs of this appeal and still be able to provide himself and spouse with the necessities of life.

6. This is a brief in opposition to a petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petition does not raise substantial questions of public importance or constitutional law as alleged by the Petitioners. Affiant believes he is entitled to the redress sought in this Court.

ROBERT HASTINGS

Subscribed and sworn to before me this 15th day of July, 1980.

NOTARY PUBLIC

My Commission Expires: 9/14/84

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents Motion for Leave to Proceed in Forma Pauperis and Affidavit were mailed, postage prepaid, this 17th day of July, 1980 to the following parties:

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TERSH BOASBERG

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AND
CONTINENTAL CASUALTY COMPANY,

Petitioners

v.

ROBERT HASTINGS
AND
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,

Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1979

NO. 79-1988

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v.

ROBERT HASTINGS
AND
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,

Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMIBA CIRCUIT

Respondent, Robert Hastings, prays that this Court deny Petitioners', Earth Satellite Corporation and Continental Casualty Company, Petition for Writ of Certiorari to Review (hereinafter cited as Petition) the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 19, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals entered March 19, 1980, not yet reported, appears in the Appendix to the Petition for Writ of Certiorari in the above-entitled matter (hereinafter

cited as App.) (App. 1-27a), as do the opinion and decision of the Benefits Review Board dated June 30, 1978 (App. 28a-37a), and the decision and order of Administrative Law Judge Robert S. Amery dated August 12, 1977 (App. 38a-61a).

JURISDICTION

Respondent is satisfied with the statement of jurisdiction presented by Petitioners.

QUESTIONS PRESENTED

1. Does Supreme Court precedent support the judgement of the Court of Appeals below on the issue of the retroactivity of §14(m)?

2. Is the Court of Appeals' finding of reversible error supported by Supreme Court precedent?

STATUTES INVOLVED

Respondent is satisfied with Petitioners' presentation of the relevant statutes.

STATEMENT OF THE CASE

Respondent Robert Hastings, now 57 years old, suffered a work-related, compensable stroke on April 1, 1971, while employed as a high-level executive by Earth Satellite Corporation, the insured of the Carrier/Petitioner herein.

At the time of his stroke, Respondent was earning $30,000 per year.

During his recovery at home from the stroke--from April, 1971 until he returned to work for Earth Satellite on a part-time basis in February, 1972--Respondent was entitled to (and was awarded by the authorities below) compensation for temporary, total disability. (This award is undisputed here.)

Respondent never fully recovered 100% from his 1971 stroke which left him permanently, partially disabled with some indeterminate percentage of impairment.

Respondent, however, was able to return to work on a part-time basis at Earth Satellite while further recovering from his stroke. He worked there from February, 1972 until he suffered a second, work-related disabling injury--phlebitis and pulmonary emboli (hereafter emboli)--in March, 1974. Thereafter, Respondent was permanently and totally disabled.

During this two-year period of part-time work, Respondent was paid at the hourly rate of his former $30,000 annual salary. However, because he worked less than 40 hours per week, he earned only $9,228 during the twelve months just immediately preceeding his disabling attack of emboli in March, 1974. A review of Respondent's undisputed earnings record during this two-year period shows him gradually working more hours each month and, consequently, steadily increasing his wages until the March, 1974 emboli attack.

During this two-year period of part-time employment, Respondent also was entitled to (and was awarded) compensation for the residual permanent, partial disability caused by his 1971 stroke. Under §8(c)(21) of the Act, 33 U.S.C. §908(c)(21), Respondent was entitled to compensation equal to 2/3 of the difference between his "average weekly wages" ($177/wk., based on his part-time earnings of $9,228) and his "wage-earning capacity" ($577/wk., based on his $30,000 pre-stroke injury), i.e., 2/3 of $400 or $266. But instead of receiving $266 per week as permanent, partial disability, Respondent was awarded only $70 per week because that was the Act's statutory weekly maximum compensation in force at the time of his 1971 stroke.

Still, as noted above, the percentage of Respondent's permanent, partial disability resulting from the 1971 stroke was

never determined--presumably because with the $70 weekly maximum then in force, the amount due Respondent (2/3 of the difference between current wages--$9,000 and earning capacity--$30,000) under any rational percentage of disability which could be found, nevertheless, would exceed $70/wk. Thus, the authorities below never decided the question of percentage of partial disability, awarding Respondent the then maximum of $70/wk. This failure has important ramifications as will be seen later.

The BRB decision provides that Respondent's award of $70/wk. for permanent, partial disability resulting from the 1971 stroke should be paid only until a total of $24,000 is reached, despite the fact that in 1972 the Act was amended to remove the $24,000 ceiling. At the time this amendment went into effect, on November 26, 1972, Respondent had not yet received $24,000 nor had this claim even been filed.

As noted above, in March, 1974, Respondent suffered a second, work-related compensable disabling injury (emboli). The authorities below found that the combination of both the 1971 stroke and the 1974 emboli--in some indeterminate percentage--left Respondent permanently and totally disabled and, consequently, entitled to permanent, total disability payments under the Act.

The ALJ held that Respondent's award of permanent, partial disability payments of $70/wk. (for the 1971 stroke) merged into Respondent's permanent, total disability at the time of the 1974 emboli. In other words, Respondent's award of permanent, partial disability stopped when he became permanently, totally disabled in 1974. However, the ALJ then went on and inexplicably computed Respondent's entire compensation for permanent, total disability based only on 2/3 of Respondent's then

admittedly part-time wages ($177/wk.) instead of on Respondent's total wage earning capacity ($577/wk.) before both the 1971 stroke and the 1974 emboli reduced him to permanent, total disability. Thus, a $30,000 per year executive ended up with only $118 a week compensation for permanent, total disability resulting from two fully compensable injuries.

The BRB's decision did not disturb the method of the ALJ's computation of $118/wk. for Respondent's permanent, total disability. However, the BRB modified the ALJ's decision by holding that, in addition to the $118/wk. award, Hastings also should receive, at the same time, the $70/wk., previously awarded for permanent, partial disability until a maximum of $24,000 had been received. Thus, Respondent now was to receive two separate but concurrent awards: one for $70/wk. (up to $24,000) for his permanent, partial disability resulting from the 1971 stroke; and a second for $118/wk. for permanent, total disability stemming from the 1974 emboli, the latter compensation award based only on Respondent's then actual part-time salary.

Respondent filed a petition for review of the BRB decision with the United States Court of Appeals for the District of Columbia Circuit challenging the BRB's application of the $24,000 limitation of unamended §14(m) to his benefits for his permanent partial disability related to the first injury and the calculation of benefits owed for the second injury. On March 19, 1980, the Court of Appeals issued its decision and held that the BRB erred in applying the $24,000 benefit ceiling to the award for Respondent's first injury since amended §14(m) was to be applied retroactively to those cases when the ceiling had not been reached prior to the amendment date. The Court also held that the BRB

erred in calculating the award for the second injury since the Act required consideration of a claimant's potential earnings as well as his actual earnings.

REASONS FOR DENYING WRIT

I

UNITED STATES SUPREME COURT PRECEDENT FULLY SUPPORTS THE COURT OF APPEALS JUDGEMENT BELOW ON RETROACTIVITY

Petitioners endeavor to circumvent the detailed decision of the Court of Appeals for the District of Columbia Circuit on the basis of inapposite case law and tortured constitutional reasoning. All of their arguments were fully briefed below, duly considered by the Court of Appeals and flatly rejected.

The nub of Petitioners' claim, whether cloaked in the guise of prior Supreme Court decisions on retroactivity (Petitioners' Argument IA) or on the sanctity of contracts (Petitioners' Argument IB), is that the Appeals Court misinterpreted this Court's leading decision on retroactive statutory construction, namely, Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). Petitioners' argument is badly off the mark.

Not only is Bradley still the leading case on the subject,[1] but the Court of Appeals 27-page opinion below exhaustively considered each of Bradley's aspects and applied them to the question before us: whether the 1972 Amendments to the District of Columbia Workmen's Compensation Act,[2] repealing the

[1] The reasoning of the Bradley case has been followed in subsequent cases; See Hutto v. Finly, 437 U.S. 678 (1979); NLRB v. Mosey Mfg. Co., 595 F. 2d 375 (7th Cir., 1979); U.S. v. Fresno Unified School District, 592 F. 2d 1088 (9th Cir. 1979).

[2] 33 U.S.C. §901 et. seq., hereafter cited as the "Act."

$24,000 compensation limit imposed by former §14(m) of the Act, should be applied "retroactively" to a worker injured prior to the Amendments' passage but whose compensation had not yet reached $24,000. In reaching its unanimous decision, the Court of Appeals considered in impressive detail:

1. The pertinent statutory language of the Act and its 1972 Amendments (App. 16a-17a).

2. The full legislative history of the Act and its 1972 Amendments (App. 17a).

3. All pertinent aspects of the 1972 Amendments in toto and individually (App. 17a-18a).

4. The important rights vs. remedies distinction enunciated in the case law (App. 18a-20a).

5. The remedial nature of the Workmen's Compensation Act (App. 19a, note 22 and App. 20a, note 24).

6. The prior decisions of the Benefits Review Board on this precise issue (App. 20a).

7. And flatly rejected Petitioner's due process claims (App. 20a, note 25).

Supreme Court precedent in Bradley, supra, was rigorously followed in all respects.

II

SUPREME COURT PRECEDENT FULLY SUPPORTS THE COURT OF APPEALS' JUDGEMENT BELOW ON FINDING REVERSABLE ERROR

Almost as an aside to their misdirected attack on retroactivity, Petitioners also contend that the Court of Appeals "...substituted its judgement for that of the ALJ...in total derogation of..." Supreme Court precedent when the Court of Appeals reversed the authorities below on the issue of how to

compute a previously injured workman's benefits.[3] This is nonsense.

The Supreme Court clearly has held that the scope of judicial review embraces the power to correct an abuse of administrative discretion below. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The Court of Appeals thoroughly discussed the pertinent statute involved (Section 10(c) of the Act, 33 U.S.C. §910(c) (1976), the apposite case law and the deference owed to the administrative agency's application of these.[4] However, the Court of Appeals rightly concluded that the agency's procrustean refusal to use the flexibility provided by the above section (fully supported by applicable case law) was "...an abuse of discretion that requires remand."[5]

There is no departure from Supreme Court precedent here. Petitioners' argument on this point totally lacks intrinsic merit and pales before the Supreme Court's requirements of substantiality and impact for granting a petition for certiorari.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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[3] Petition, at 39.

[4] App. 22a-25a.

[5] App. 25a.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, postage prepaid, this 17 day of July, 1980 to the following parties:

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